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Report of the Human Rights Committee

Volume II

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Official Records • Fifty-third Session
Supplement No. 40 (A/53/40)

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NOTE

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The present document contains annexes XI and XII of the report of the Human Rights Committee. Chapters I to VIII and annexes I to X are contained in volume I.

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ANNEX XI

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 532/1993, M. Thomas v. Jamaica* (adopted on 3 November 1997, sixty-first session)

Submitted by:	Maurice Thomas [represented by the London law firm of Duthie Hart & Co.]
Victim:	The author
State party:	Jamaica
Date of communication:	17 November 1992 (initial submission)
Date of decision on admissibility:	6 July 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1997,

Having concluded its consideration of communication No. 532/1993 submitted to the Human Rights Committee on behalf of Mr. Maurice Thomas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion signed by two Committee members is attached.

1. The author of the communication is Maurice Thomas, a Jamaican citizen who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights.[1] His death sentenced was commuted in 1995. He is represented by Shaun Murphy of the London law firm of Duthie Hart and Duthie.

The facts as submitted by the author

2.1 On 5 February 1985, the author was convicted of the murder of one Anthony Chamberlain and sentenced to death by the Home Circuit Court, Kingston, Jamaica; he claims to be innocent. The Court of Appeal treated the application for leave to appeal as the hearing of the appeal dismissing it on 28 January 1987; a written judgment was issued on 12 April 1988. On 23 July 1992, the Judicial Committee of the Privy Council denied special leave to appeal. Following a reclassification hearing on 27 March 1995, the offence of which the author was convicted was reclassified as non-capital and his death sentence was commuted.

2.2 The prosecution's case was that, on 15 March 1982 at approximately 6:30 p.m., one Allan Gray and his common law wife, Gloria Thompson, who were in the backyard of their house, heard gunshots from the front where the deceased, Gloria Thompson's nephew, was sitting. They went around the house and saw the victim staggering towards them, mortally wounded. Behind him followed two men. Allan Gray identified one of them as the author, and said that he fired a shot at him, Gray then ran to the other side of the house. He was caught there by two other men, who shot him through the jaw. The author was only arrested on 26 July 1982.

2.3 The prosecution's case rested exclusively on the identification evidence of Allan Gray and Gloria Thompson. No ballistic or forensic evidence was adduced. Gray testified that he had known the author from childhood. He had given the author's name and the names of the three other men to the police. Gloria Thompson testified that although she did not know the author's name, she had known him for a long time.

2.4 The author testified that, at the time of the killing, he was at home with his mother and sister, approximately half a mile away from the deceased's home. The defense did not call his mother and sister as witnesses during the trial, but another witness testifying on the author's behalf stated that at approximately 6 p.m. she had seen the author at his home with his mother and sister, and then again at approximately 7 p.m.

2.5 The author submits that on 5 April 1988, one Eugene Benjamin, another inmate detained at St. Catherine's District Prison, confessed to the murder of Anthony Chamberlain shortly before his death. The confession was allegedly repeated before police officers, the Superintendent of the Prison and a magistrate; it is contended that the confession was put into writing. Efforts to obtain a copy of the alleged confession have remained unsuccessful.

The complaint

3.1 The author claims a violation of article 14, paragraph 3(c), in that the delays in judicial proceedings in his case amount to a violation of his right to be tried without undue delay. From the date of his arrest, he waited two and a half years until the trial, another two years until the conclusion of his first appeal, a further 15 months until the written judgment of the court of Appeal, and yet another four years and three months until the decision of the Judicial Committee of the Privy Council. The last delay allegedly was due to the State party's failure to grant him legal aid.

3.2 The author further alleges that the State party's failure to provide him with legal aid for his petition to the Judicial Committee of the Privy Council is a violation of article 14, paragraphs 3(b) and (d). The absence of legal aid prevented the case from being conducted swiftly and counsel from collecting any further evidence on the author's behalf. Particular reference is made to the alleged confession of Eugene Benjamin, which could not be fully investigated due to the absence of a lawyer in Jamaica, and to the impossibility for counsel in London to trace and interview the author's mother and sister.

3.3 It is further submitted that, as a result of the judicial delays, the lack of proper legal representation in Jamaica following the unsuccessful appeal, and his confinement to death row between 1985 and 1995, the author's uncertainty and distress intensified. This is said to amount to cruel, inhuman and degrading treatment, in violation of article 7.

3.4 It is submitted that the failure to provide Mr. Thomas or his counsel with a copy of Mr. Benjamin's confession statement, exonerating the author of the offence for which he was convicted, constitutes a violation of the author's rights under article 14, in particular of his right to appeal, since, in the absence of said document, he could not pursue his right, under Section 29(1) of the Judicature (Appellate Jurisdiction) Act, to have his case reviewed. In this context, counsel submits that he has contacted the Registrar of the Court of Appeal, the Director of Public Prosecutions, the Minister of Justice and the Governor General, all to no avail. He states that the Deputy Director of Public Prosecutions informed him that the statement was considered by the Jamaica Privy Council on 2 August 1988; however, no copy was made available to counsel.

3.5 The author further claims that until a full investigation is made into the alleged confession statement of Eugene Benjamin, and until his mother and sister are interviewed, his execution would constitute an arbitrary deprivation of his life, in violation of article 6, paragraph 1, since he has not been given a reasonable opportunity to exonerate himself through gathering of all evidence. This allegation has become moot after commutation of the author's sentence.

The State party's observations

4. By submission of 30 March 1994, the State party argues that the communication was inadmissible for failure to exhaust domestic remedies.

Committee's decision on admissibility

5.1 At its fifty-fourth session, the Committee considered the admissibility of the communication. It noted that the author was convicted of murder, that his appeal was dismissed and that his special petition for leave to appeal to the Judicial Committee of the Privy Council was rejected. It therefore concluded that it was not precluded by article 5, paragraph 2(b), from considering the communication.

5.2 The Committee considered that the author and his counsel had sufficiently substantiated, for purposes of admissibility, that the communication could raise issues under article 14 and, consequently, under article 6 of the Covenant, which needed to be examined on the merits.

5.3 As to the author's claim that his prolonged detention on death row amounted to a violation of article 7 of the Covenant, the Committee noted that although some national courts of last resort had held that prolonged detention on death row for a period of five years or more violates their constitutions or laws, the Committee's jurisprudence remained that detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances.[2] The Committee observed that the author had not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication was therefore deemed inadmissible under article 2 of the Optional Protocol.

Issues and proceedings before the Committee

6.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, following the transmittal of the Committee's decision on admissibility, no further information has been received from the State party clarifying the matter raised by the present communication, despite a reminder sent to it on 11 March 1997. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 The Committee notes that the information before it shows that the author was arrested on 26 July 1982, that he was convicted for murder on 5 February 1985, the appeal dismissed on 28 January 1987, that a written judgement was not issued by the Court of Appeal until 12 April 1988 and that the Privy Council denied leave on 23 July 1992. Proceedings against the author therefore took just under 10 years to complete. The author remained in detention throughout this period and was confined to death row from 1985 onwards. Article 14, paragraph 3(c), of the Covenant prescribes that anyone charged with a criminal offence has the right to be tried without undue delay; the Committee concludes that a delay of almost 31 months from arrest to conviction plus a further three years before the completion of the Appeal proceedings cannot be deemed compatible with this provision, in the absence of any explanations from the State party justifying the delay. The denial of legal aid which contributed to the further delay in the author's application for leave to appeal to the Privy Council is also a violation of article 14, paragraph 3(d).

6.3 The author contends that he was unable to obtain the attendance and examination of witnesses on his behalf on equal terms as witnesses against him. Reference is made in particular to the availability of the author's mother and sister, who were not called as alibi witnesses. However, the Committee considers that as defense witnesses were available to the author, and one alibi witness was in fact called, it was counsel's professional judgment not to call them. The Committee also observes that the material before it does not reveal that either counsel or the author himself ever complained to the trial judge that they were unable to examine the witnesses under the same conditions as witnesses for the prosecution, or unable to examine some witnesses at all. The Committee therefore finds no violation of article 14, paragraph 3(e), of the Covenant.

6.4 The author claims that his right to appeal to the Court of Appeal of Jamaica was violated because neither he nor his counsel were provided with a copy of Mr. Benjamin's alleged confession statement which would exonerate the author. He also claims that the absence of legal aid prevented him from having further investigations carried out in relation to the alleged confession. In the absence of the document, he claims that he could not pursue his right under Section 29(1) of the Judicature (Appellate Jurisdiction) Act to have his case reviewed. The Committee notes that the State party has not explained why this alleged statement was never made available to the author or to his counsel; it notes too that counsel states that the Deputy Director of Public Prosecutions informed him that the statement was considered by the Jamaica Privy Council on 2 August 1988, and considered that it did not warrant a reference to the Court of Appeal on Section 29 (1), and was not referred. The Committee is of the view that the failure to provide Mr. Thomas with legal aid in Jamaica has denied him the opportunity to have enquiries made about the matter and to pursue such legal remedies as may have been available to him in Jamaica in accordance with the Constitution or otherwise and that this amounts to a violation of article 14, paragraph 3(d), in conjunction with article 2, paragraph 3.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 3(c) and (d), of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee has noted that the State party has commuted the author's death sentence and recommends that, in view of the fact that the author has spent over fifteen years in prison, the State party consider the author's release. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] On 19 October 1993, the Human Rights Committee adopted its Views in respect of another communication (No. 321/1988) from Mr. Maurice Thomas, concerning violations of articles 7 and 10 of the Covenant; a violation of both these articles was found.

[2] See the Committee's Views on communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, paragraph 12.6. See also, inter alia, the Committee's Views on communications Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, and No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993.

APPENDIX

Individual opinion by Messrs. Fausto Pocar and Rajsoomer Lallah

While we concur with most of the conclusions reached by the Committee in the present case, we cannot join the Committee's views as far as they refer to the author's claim that prolonged detention on death row amounted to a violation of article 7 of the Covenant. The Committee has declared the claim inadmissible under article 2 of the Optional Protocol on the following grounds: on the one hand it recalled its previous jurisprudence according to which detention on death row for any specific period is not a violation of article 7 of the Covenant in the absence of some further compelling circumstances; on the other hand, it observed that the author had not substantiated, for purposes of admissibility, any of such circumstances.

The arguments are not persuasive. As to the first ground, it is true that the Committee's jurisprudence - as expressed by the majority of the Committee's members, though with several dissenting opinions - is that prolonged detention on death row does not constitute per se a violation of article 7 of the Covenant in the absence of further compelling circumstances. However, in reaching these views, the Committee had to consider and resolve the issue on its merits. Although reaffirmed in a number of cases, those views, as any other views of the Committee based on legal grounds, can be reversed or modified at any time, in the light of further arguments raised by Committee members during the consideration of another case. In such circumstances, the Committee's previous jurisprudence cannot be invoked as a ground per se for declaring a claim inadmissible under the Optional Protocol.

These considerations would in themselves render moot the second ground invoked to declare the claim inadmissible. However, even this ground is in our view unfounded also for other reasons. The author of the present communication had not merely referred to prolonged detention on death row to substantiate his claim of violation of article 7, but submitted that, as a result of judicial delays, the lack of proper legal representation and his confinement on death row, his uncertainty and distress intensified; on that basis, he claimed that he was subjected to cruel, inhuman and degrading treatment. By referring to such other relevant circumstances, he had substantiated, for purposes of admissibility, his claim. Therefore, the author's allegations should have been considered by the Committee when dealing with the merits of the communication, in order to establish whether they could constitute such further compelling circumstances that might, according to the current jurisprudence of the Committee, render prolonged detention on death row a violation of article 7 of the Covenant.

(Signed) Fausto POCAR

(Signed) Rajsoomer LALLAH

(Original: English)

B. Communication No. 554/1993, R. LaVende v. Trinidad and Tobago*
(adopted on 29 October 1997, sixty-first session)

Submitted by:	Robinson LaVende [represented by Interights, London]
Victim:	The author
State party.	Trinidad and Tobago
Date of communication:	4 October 1993 (initial submission)
Date of decision on admissibility:	12 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 1997,

Having concluded its consideration of communication No. 554/1993 submitted to the Human Rights Committee on behalf of Mr. Robinson LaVende under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Robinson LaVende, a Trinidadian citizen who, at the time of submission of his communication, was awaiting execution at the State Prison of Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations by Trinidad of articles 7, 10, paragraph 1, and 14, paragraph 3(d), of the International Covenant on Civil and Political Rights. On 31 December 1993, the author's death sentence was commuted to life imprisonment, in accordance with the Guidelines laid down in the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in the case of Pratt and Morgan v. Attorney General of Jamaica. He is represented by Interights, a London-based organization.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion signed by six Committee members is attached.

The facts as submitted by the author

2.1 The author was tried for murder, found guilty as charged and sentenced to death in July 1975; no information is provided about the facts of the case or the conduct of the trial. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 28 November 1977.

2.2 In early 1978, the author applied for legal aid to the Minister of National Security of Trinidad, so as to allow him to prepare and file a further appeal with the Judicial Committee of the Privy Council; the application for legal aid was refused. As a result, the author argues, he was unable to petition the Judicial Committee for special leave to appeal.

2.3 On 30 September 1993, a warrant for the author's execution on 5 October 1993 was read to him. A constitutional motion on his behalf was filed in the High Court of Trinidad and Tobago on 1 October 1993. A stay of execution was granted during the night of 4 to 5 October 1993.

2.4 The author argues that he has exhausted domestic remedies within the meaning of the Optional Protocol, and that the fact that a constitutional motion was filed on his behalf does not preclude his recourse to the Human Rights Committee. As to the denial of legal aid for the purpose of petitioning the Judicial Committee of the Privy Council, it is argued that the State party is now estopped from arguing that he was obliged to pursue this matter further before the domestic courts before bringing it before the Committee.

2.5 Counsel further contends that because of the very nature of her client's situation, he will necessarily invoke all available procedures, possibly until the scheduled time of execution. To require that all last minute procedures be exhausted before allowing a recourse to the Human Rights Committee would imply that the applicant either wait until a moment dangerously close in time to his execution, or that he refrain from invoking all potentially available domestic remedies. It is submitted that neither option is within the letter or the spirit of the Optional Protocol.

The complaint

3.1 The author, who was confined to death row from the time of his conviction in July 1975 until the commutation of his death sentence on 31 December 1993, i.e. over 18 years, alleges a violation of article 7, on the ground that the period of time spent on death row amounts to cruel, inhuman and degrading treatment. He further contends that the time spent on death row is contrary to his right, under article 10, paragraph 1, to be treated with humanity and respect for the inherent dignity of his person. It is argued that the execution of a sentence of death after so many years on death row would amount to a violation of the above-mentioned provisions. In support of her arguments, counsel refers to recent jurisprudence, inter alia a recent judgment of the Supreme Court of Zimbabwe[1], the judgment of the European Court of Human Rights in the case of Soering[2], and the arguments of counsel for the applicants in the case of Pratt and Morgan v. Attorney General of Jamaica.

3.2 It is submitted that the State party violated article 14, paragraph 3(d), by denying the author legal aid for the purpose of petitioning the Judicial Committee for special leave to appeal. Counsel relies on the Committee's jurisprudence, pursuant to which legal aid must be made available to convicted prisoners under sentence of death, and that this applies to all stages of the criminal proceedings"[3] Reference is also made to judgments of the Supreme Court of the U.S.[4].

The Committee's admissibility decision

4.1 During the 55th session, the Committee considered the admissibility of the communication. It noted that the State party had forwarded a note dated 9 February 1994, stating that the author's death sentence had been commuted to life imprisonment on 31 December 1993; the State party observed that the commutation was the consequence of the judgment of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica[5]. No further information under rule 91 of the Committee's rules of procedure was received from the State party, despite a reminder addressed to it on 7 December 1994.

4.2 The Committee welcomed the information of 9 February 1994 but noted that the State party had not provided information and observations relating to the admissibility of the author's claims, which had not been made moot by the commutation of sentence. Due weight had thus to be given to the author's allegations, to the extent that they had been substantiated.

4.3 As to the claims under articles 7 and 10, paragraph 1, the Committee observed that the State party had itself commuted the author's death sentence, so as to comply with the Guidelines formulated by the Judicial Committee of the Privy Council in the above-mentioned case. The Government had not informed the Committee of the existence of any further remedies available to the author in respect of the above claims; indeed, the State party's silence in this respect constituted an admission that no such remedies existed.

4.4 Regarding the claim under article 14, paragraph 3(d), the Committee noted that the author was refused legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal. There being no indication that the author was not entitled to pursue such an appeal, the Committee concluded that this claim, which also appeared to raise issues under article 14, paragraph 5, should be considered on the merits.

4.5 On 12 October 1995, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 10, paragraph 1, and 14, paragraphs 3(d) and 5, of the Covenant.

Examination of the merits

5.1 The State party's deadline for the submission of information and observations under article 4, paragraph 2, of the Optional Protocol expired on 16 May 1996. No submission was received from the State party, in spite of a reminder addressed to it on 11 March 1997. The Committee regrets the lack of cooperation on the part of the State party. It has examined the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

5.2 The Committee must first determine whether the length of the author's detention on death row - from July 1975 to December 1993 (over 18 years) -

amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel claims a violation of these provisions merely by reference to the length of detention the author was confined to death row at the State Prison in Port-of-Spain. The length of detention on death row in this case is unprecedented and a matter of serious concern. However, it remains the jurisprudence of the Committee that the length of detention on death row does not, per se, amount to a violation of articles 7 or 10, paragraph 1. The Committee's detailed Views on this issue were set out in the Views on communication No. 588/1994 (Errol Johnson v. Jamaica)[6]. Because of the importance of the issue, the Committee deems it appropriate to reiterate its position.

5.3 In assessing whether the mere length of detention on death row may constitute a violation of articles 7 and 10, the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable". Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

5.4 In light of these factors, we must examine the implications of holding the length of detention on death row, per se, to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, per se, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.

5.5 The second implication of making the time factor per se the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed. It should be stressed that by adopting the approach that prolonged detention on death row cannot, per se, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.

5.6 To accept that prolonged detention on death row does not per se constitute a violation of articles 7 and 10, paragraph 1, does not imply that other circumstances connected with detention on death row may not turn that detention into cruel, inhuman or degrading treatment or punishment. The Committee's jurisprudence has been that where further compelling circumstances relating to the detention are substantiated, that detention may constitute a violation of articles 7 and/or 10, paragraph 1, of the Covenant.

5.7 In this case, counsel has not alleged the existence of circumstances, over and above the mere length of detention, which would have turned the author's detention on death row at the State Prison into a violation of articles 7 and 10, paragraph 1. As the Committee must, under article 5, paragraph 1, of the Optional Protocol, consider the communication in the light of all the information of the parties, the Committee cannot, in the absence of information on additional factors, conclude that there has been a violation of these provisions.

5.8 Regarding the claim under article 14, paragraph 3(d), the State party has not denied that the author was denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that it is imperative that legal aid be available to a convicted prisoner under sentence of death, and that this applies to all stages of the legal proceedings[7]. Section 109 of the Constitution of Trinidad and Tobago provides for appeals to the Judicial Committee of the Privy Council. It is uncontested that in the present case, the Ministry of National Security denied the author legal aid to petition the Judicial Committee in forma pauperis, thereby effectively denying him legal assistance for a further stage of appellate judicial proceedings which is provided for constitutionally; in the Committee's opinion, this denial constituted a violation of article 14, paragraph 3(d), whose guarantees apply to all stages of appellate remedies. As a result, his right, under article 14, paragraph 5, to have his conviction and sentence reviewed "by a higher tribunal according to law" was also violated, as the denial of legal aid for an appeal to the Judicial Committee effectively precluded the review of Mr. LaVende's conviction and sentence by that body.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before the Committee reveal a violation of article 14, paragraphs 3(d) _juncto_ 5, of the Covenant.

7. Under article 2, paragraph 3(a), of the Covenant, the author is entitled to an effective remedy. While the Committee welcomes the commutation of the author's death sentence by the State party's authorities on 31 December 1993, it considers that an effective remedy in the instant case should include a further measure of clemency.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, and while reiterating its satisfaction over the commutation of the author's death sentence, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] Supreme Court of Zimbabwe, judgment No. S.C. 73/93 of June 1993.

[2] _Soering v. United Kingdom_, 11 EHRR 439 (1989).

[3] Views on communication No. 250/1987 (_C. Reid v. Jamaica_), adopted 20 July 1990, paragraph 11.4; Views on communication No. 230/1987 (_Henry v. Jamaica_), adopted 1 November 1991, paragraph 8.3.

[4] E.g. _Lane v. Brown_, 372 U.S. 477 (1963).

[5] Privy Council Appeal No.10 of 1993, judgment of 2 November 1993.

[6] Views on communication No. 588/1994 (_Errol Johnson v. Jamaica_), adopted 22 March 1996, paragraphs 8.1 to 8.6.

[7] See Views on communication No. 230/1987 (_Raphael Henry v. Jamaica_), adopted 1 November 1991, paragraph 8.3.

APPENDIX

Individual opinion by Committee member Fausto Pocar, co-signed by Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Pilar Gaitan de Pombo and Mr. Julio Prado Vallejo and Mr. Maxwell Yalden regarding the cases of LaVende and Bickaroo

The Committee reiterates in the present cases the views that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant. This view reflects a lack of flexibility that would not allow the Committee to examine the circumstances of each case, in order to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of the above-mentioned provision. This approach leads the Committee to conclude, in the present cases, that detention on death row for almost sixteen/eighteen years after the exhaustion of local remedies does not allow a finding of violation of article 7. We cannot agree with this conclusion. Keeping a person detained on death row for so many years, after exhaustion of domestic remedies, and in the absence of any further explanation of the State party as to the reasons thereof, constitutes in itself cruel and inhuman treatment. It should have been for the State party to explain the reasons requiring or justifying such prolonged detention on death row; however, no justification was offered by the State party in the present cases.

Even assuming, as the majority of the Committee does, that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant, the circumstances of the present communication would in any case reveal a violation of the said provision of the Covenant. The facts of the communication, as submitted by the author and uncontested by the State party, show that "on 30 September 1993 a warrant for the author's execution on 5 October 1993 was read to him... A stay of execution was granted during the night of 4 to 5 October 1993". In our view, reading a warrant of execution to a detainee remaining confined to death row for such a long time, and attempting to proceed to his execution after so many years - at a time when the State party had raised in the detainee a legitimate expectation that the execution would never be carried out - constitute in themselves cruel and inhuman treatment within the meaning of article 7 of the Covenant, to which the author was subjected. Moreover, they constitute such further "compelling circumstances" that should have led the Committee, even if it wanted to reaffirm its previous jurisprudence, to find that prolonged detention on death row revealed, in the present cases, a violation of article 7 of the Covenant.

(*Signed*) F. POCAR

(*Signed*) P. N. BHAGWATI

(*Signed*) Ch. CHANET

(*Signed*) P. GAITAN DE POMBO

(*Signed*) J. PRADO VALLEJO

(*Signed*) M. YALDEN

(Original: English)

C. Communication No. 555/1993, R. Bickaroo v. Trinidad and Tobago* (adopted on 29 October 1997, sixty-first session)

Submitted by:	Ramcharan Bickaroo [represented by Interights, London]
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	5 October 1993 (initial submission)

Date of decision on admissibility: 12 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 1997,

Having concluded its consideration of communication No. 555/1993 submitted to the Human Rights Committee on behalf of Mr. Ramcharan Bickaroo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ramcharan Bickaroo, a Trinidadian citizen who, at the time of submission of his complaint, was awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations by Trinidad of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights. On 31 December 1993, his death sentence was commuted to life imprisonment by the President of Trinidad and Tobago, in accordance with the Guidelines laid down in the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in the case of Pratt and Morgan v. Attorney General of Jamaica. He is represented by Interights, a London-based organization.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the rules of procedure, Committee member Rajsoomer Lallah did not participate in the adoption of the Views. The text of an individual opinion signed by six Committee members is attached.

The facts as submitted by the author

2.1 The author was arrested in 1975 and charged with murder. No information is provided about the circumstances or facts of the crime with which he was charged. He was tried for murder in the Port-of-Spain Assizes Court, found guilty as charged and sentenced to death on 5 April 1978. His appeal was dismissed by the Court of Appeal of Trinidad and Tobago on 21 June 1979.

2.2 On an unspecified date after the dismissal of the appeal, the author was informed by his counsel that there were no grounds on which a further appeal to the Judicial Committee of the Privy Council could be argued with any prospect of success. On 30 September 1993[1], a warrant was issued for the execution of the author on 5 October 1993. A constitutional motion was filed on his behalf in the High Court of Trinidad and Tobago, and a stay of execution was granted during the night of 4 to 5 October 1993.

2.3 The author argues that he has exhausted domestic remedies within the meaning of the Optional Protocol, and that the fact that a constitutional motion was filed on his behalf in the High Court of Trinidad and Tobago should not preclude his recourse to the Human Rights Committee. He contends that because of the very nature of his situation, an individual on death row whose warrant of execution has been read will necessarily invoke all available procedures, possibly until the scheduled time of execution.

2.4 Counsel adds that to require that all last minute procedures be exhausted before allowing a recourse to the Human Rights Committee would imply that the applicant either wait until a moment dangerously close in time to his execution, or that he refrain from invoking all potentially available domestic remedies. It is submitted that neither option is within the letter or the spirit of the Optional Protocol.

The complaint

3.1 The author, who was confined to the death row section of the State Prison from the time of his conviction in April 1978 to 31 December 1993, i.e. close to 16 years, alleges a violation of article 7 of the Covenant, on the ground that the length of time spent on death row amounts to cruel, inhuman and degrading treatment. He further argues that the period of time spent on death row runs counter to his right, under article 10, paragraph 1, to be treated with humanity and respect for the inherent dignity of his person.

3.2 It is argued that the execution of the sentence after so many years on death row would amount to a violation of the above-mentioned provisions. In support of his argument, counsel refers to recent jurisprudence, *inter alia* a judgment of the Supreme Court of Zimbabwe[2], the judgment of the European Court of Human Rights in the case of *Soering*[3], and the arguments of counsel for the applicants in the case of *Pratt and Morgan v. Attorney-General of Jamaica*.

Committee's admissibility decision

4.1 During its 55th session, the Committee considered the admissibility of the communication. It noted that no submission under rule 91 had been received from the State party, in spite of a reminder addressed to it on 6 December 1994. The State party had merely forwarded a list with the names of individuals whose death sentences were commuted following the judgment of the Judicial Committee of the Privy Council in the case of Pratt and Morgan; the author's name had been included in that list. While welcoming this information, the Committee noted that the author's claims under the Covenant had not been made moot by the commutation of the death sentence. As the State party had failed to provide information under rule 91, due weight had to be given to the author's allegations, to the extent that they had been sufficiently substantiated.

4.2 As to the claims under articles 7 and 10, paragraph 1, the Committee observed that the State party had itself commuted the author's death sentence, so as to comply with the guidelines formulated by the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General. The State party had not informed the Committee of the existence of any further remedies in respect of these claims; indeed, its silence in this respect constituted an admission that no such remedies existed.

4.3 On 12 October 1995, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7 and 10, paragraph 1, of the Covenant.

Examination of the merits

5.1 The State party's deadline for the submission of information and observations under article 4, paragraph 2, of the Optional Protocol expired on 16 May 1996. No submission was received from the State party, in spite of a reminder addressed to it on 11 March 1997. The Committee regrets the lack of cooperation on the part of the State party. It has examined the present communication in the light of all the information made available by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

5.2 The Committee must determine whether the length of the author's detention on death row - between April 1978 and December 1993 - amounts to a violation of articles 7 and 10 of the Covenant. Counsel alleges a violation of these provisions merely by reference to the length of detention the author was confined to death row at the State Prison in Port-of-Spain. The length of detention on death row in this case is unprecedented and a matter of serious concern. However, it remains the jurisprudence of the Committee that the length of detention on death row does not, per se, amount to a violation of articles 7 or 10, paragraph 1. The Committee's detailed Views on this issue were set out in the Views on communication No. 588/1994 (Errol Johnson v. Jamaica)[4]. Because of the importance of the issue, the Committee deems it appropriate to reiterate its position.

5.3 In assessing whether the mere length of detention on death row may constitute a violation of articles 7 and 10, the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable". Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

5.4 In light of these factors, we must examine the implications of holding the length of detention on death row, per se, to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, per se, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.

5.5 The second implication of making the time factor per se the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed. It should be stressed that by adopting the approach that prolonged detention on death row cannot, per se, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.

5.6 To accept that prolonged detention on death row does not, *per se*, constitute a violation of articles 7 and 10, does not imply that other circumstances connected with detention on death row may not turn that detention into cruel, inhuman or degrading treatment or punishment. The Committee's jurisprudence has been that where further compelling circumstances relating to the detention are substantiated, that detention may constitute a violation of articles 7 and/or 10, paragraph 1, of the Covenant.

5.7 In this case, counsel has not alleged the existence of circumstances, over and above the mere length of detention, which would have turned the author's detention on death row at the State Prison into a violation of articles 7 and 10, paragraph 1. As the Committee must, under article 5, paragraph 1, of the Optional Protocol, consider the communication in the light of all the information of the parties, the Committee cannot, in the absence of information on additional factors, conclude that there has been a violation of these provisions.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee do not reveal a violation by Trinidad and Tobago of any of the provisions of the Covenant.

7. The Committee welcomes the commutation of Mr. Bickaroo's death sentence by the State party's authorities in December of 1993.

(Adopted in English, French and Spanish, the English text being the origina
version. Subsequently issued also in Arabic, Chinese and Russian as part of th
present report.)

Notes

[1] The date does not appear clearly in the communication; it appears, however, that the warrant was issued on the same day as the warrant for the execution of Robinson LaVende (see communication No. 554/1993).

[2] Supreme Court of Zimbabwe, Judgment No. S.C. 73/93 of June 1993.

[3] *Soering v. United Kingdom*, 11 EHRR 439 (1989).

[4] Views on communication No. 588/1994 (*Errol Johnson v. Jamaica*), adopted 22 March 1996, paras. 8.1 to 8.6.

APPENDIX

Individual opinion by Committee member Fausto Pocar, co-signed by Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Pilar Gaitan de Pombo, Mr. Julio Prado Vallejo and Mr. Maxwell Yalden regarding the cases of LaVende and Bickaroo

The Committee reiterates in the present cases the views that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant. This view reflects a lack of flexibility that would not allow the Committee to examine the circumstances of each case, in order to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of the above-mentioned provision. This approach leads the Committee to conclude, in the present cases, that detention on death row for almost sixteen/eighteen years after the exhaustion of local remedies does not allow a finding of violation of article 7. We cannot agree with this conclusion. Keeping a person detained on death row for so many years, after exhaustion of domestic remedies, and in the absence of any further explanation of the State party as to the reasons thereof, constitutes in itself cruel and inhuman treatment. It should have been for the State party to explain the reasons requiring or justifying such prolonged detention on death row; however, no justification was offered by the State party in the present cases.

Even assuming, as the majority of the Committee does, that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant, the circumstances of the present communication would in any case reveal a violation of the said provision of the Covenant. The facts of the communication, as submitted by the author and uncontested by the State party, show that "on 30 September 1993 a warrant for the author's execution on 5 October 1993 was read to him... A stay of execution was granted during the night of 4 to 5 October 1993". In our view, reading a warrant of execution to a detainee remaining confined to death row for such a long time, and attempting to proceed to his execution after so many years - at a time when the State party had raised in the detainee a legitimate expectation that the execution would never be carried out - constitute in themselves cruel and inhuman treatment within the meaning of article 7 of the Covenant, to which the author was subjected. Moreover, they constitute such further "compelling circumstances" that should have led the Committee, even if it wanted to reaffirm its previous jurisprudence, to find that prolonged detention on death row revealed, in the present cases, a violation of article 7 of the Covenant.

(*Signed*) F. POCAR

(*Signed*) P. N. BHAGWATI

(*Signed*) Ch. CHANET

(*Signed*) P. GAITAN DE POMBO

(*Signed*) J. PRADO VALLEJO

(*Signed*) M. YALDEN

(Original: English)

D. Communication No. 564/1993, J. Leslie v. Jamaica*
(adopted on 31 July 1998, sixty-third session)

Submitted by:	Junior Leslie (represented by Mr. Simon Phippard from the London law firm of Barlow Lyde & Gilbert)
Victim:	The author
State party:	Jamaica
Date of communication:	5 October 1993 (initial submission)
Date of decision on admissibility:	12 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 1998,

Having concluded its consideration of communication No.564/1993 submitted to the Human Rights Committee by Junior Leslie, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Junior Leslie, a Jamaican citizen who, at the time of submission of his complaint, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7; 10, paragraph 1; and 14, paragraphs 1 and 3(a) to (e), of the International Covenant on Civil and Political Rights. The author's death sentence was commuted to life imprisonment in early 1995. He is represented by the London law firm of Barlow Lyde & Gilbert.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 On 14 November 1987, the author was arrested by two policemen after a dispute concerning a bicycle. He was taken to the Hunts Bay Police Station and held in custody for five days. On 20 November 1987, he was taken to the Kingston Gun Court for a preliminary hearing; only then did he learn that he was charged, together with one Anthony Finn[1] and one L.T., with the murders, on 8 November 1987, of one Merceline Morris and her son, Dalton Brown. On 4 April 1990, the author and Anthony Finn were found guilty as charged and sentenced to death by the Home Circuit Court in Kingston; L.T. was acquitted on the direction of the trial judge at the close of the prosecution's case. The author's appeal to the Court of Appeal was dismissed on 15 July 1991; a further petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 6 October 1992. With this, it is submitted, all domestic remedies have been exhausted. On 17 December 1992, the author's case was classified as a capital case under the Offences against the Persons (Amendment) Act 1992.

2.2 The prosecution relied on the testimony of the daughter (respectively sister), Carol Brown, and grandson (respectively nephew), Orlando Campbell, of the deceased. Carol Brown testified that, on 8 November 1987 at about 8:00 p.m., her mother and Orlando Campbell were inside the house; she herself was sitting at the doorway and her brother, Dalton Brown, was in the yard with a friend, one C. The yard was lit up by a 100 watt light bulb on the exterior wall and by lights from within the house. Suddenly two armed men, whom she identified as Anthony Finn and the author, entered the yard. Immediately thereafter she heard explosions and she ran away. She stopped two houses further along, heard several more explosions, and saw C. running past her, followed by the author and Anthony Finn, who were still holding guns. Her mother, covered with blood, ran towards her, and told her that her brother had been shot. Her mother and brother died in hospital. Carol Brown testified that she had known Anthony Finn for about eight years. With respect to the author, she stated that she had first seen him one week prior to the incident, when he was pointed out to her as one of the persons involved in the beating and stabbing of her brother two weeks earlier. She only knew him by his nickname "Kentucky".

2.3 Orlando Campbell testified that, on the night of the incident, he was in bed when he saw his uncle, Dalton Brown, followed by Anthony Finn, running into the house. His uncle held on to his grandmother, who tried to block Anthony Finn. He then saw Anthony Finn shooting his grandmother. Having turned his face to the wall, he then heard Anthony Finn calling his uncle, followed by several explosions, and he heard his uncle begging for mercy. More shooting, from different directions, followed and he then heard Anthony Finn talking to another person. Orlando Campbell testified that he saw Anthony Finn, whom he knew, leaving through the gate, followed by a short stout person whose face he could not see, and by L.T., whom he also knew.

2.4 The medical evidence confirmed that the victims had been shot and died as a result of shotgun injuries.

2.5 No identification parade was held in the case; during the trial, i.e. 29 months after the murders, Carol Brown identified the author from the dock.

2.6 The author presented an alibi defence. He testified at the trial that he had spent the evening watching a video show at a community centre near his home. He stated that he only spoke with one person that evening, but that he could not remember that person's name. He further stated that two other men in the area where he lived were known by the nickname "Kentucky".

The complaint

3.1 With regard to articles 7 and 10, paragraph 1, of the Covenant, counsel forwards a statement taken from the author at St. Catherine District Prison on 28 January 1993. This states that, on 15 November 1987, while held at the Hunts Bay Police Station, the author was hit on the chest by the investigating officer (name given). Furthermore, the author claims that, throughout his detention at Hunts Bay Police Station (from 14 to 20 November 1987), he was held in a cell measuring 2 by 4 metres together with five to six other persons. He was not allowed to wash himself and was only permitted to leave the cell in order to fetch drinking water. He was further denied recreational facilities.

3.2 On 20 November 1987, the author was transferred to the General Penitentiary, Kingston; upon arrival, he was allegedly hit on his left arm, near the wrist, by one of the warders. It is submitted that because he had previously broken his left wrist, this blow caused him great pain. He remained at the General Penitentiary until 4 April 1990; throughout this period he had to share a cell of approximately 1.50 by 3 metres with four to five other prisoners. Furthermore, on an unspecified day, the author was stabbed in the face by an inmate which caused a deep cut about 10 cm long and 1 cm wide, stretching from his left ear down to his left cheek. He immediately requested medical care, but had to wait two hours before he was taken to a doctor. He received twenty stitches, but was denied follow-up medical treatment. He submits that he suffered much pain the following three days, but that he was denied pain killers.

3.3 After his conviction on 4 April 1990 the author was transferred to the death row section at St. Catherine District Prison, where he has been detained since. He claims to have suffered several assaults while in prison:

- On 1 December 1991, for example, the prisoners were not allowed out of their cells in the morning. Shortly after 1:00 p.m., inmates were given a brief opportunity to slop up their cells. The two warders on duty were Sergeant G. and a young man. The author states that, as the two warders opened the cells adjacent to his but not his own, he started to protest. They entered his cell and the young warder allegedly punched him in the left side of the head. Both warders then proceeded to kick and hit him with their batons on his back, chest, arms, legs and knees for approximately two minutes. The author submits that he experienced extreme pain during this assault and that all his cries were disregarded. After the beating he was left without food or water, nor did he receive medical treatment.

- On 2 December 1991 at about 10:00 a.m., the author was given ten minutes to slop up. Sometime after 2:00 p.m. Sergeant G. came to his cell with six or seven other warders, and he was told to slop up once again. However, before he could do so, he was told to return to his cell. On his way back to the cell, Sergeant G. and another warder started to beat him. He fell to the floor and both warders hit him repeatedly with their batons on his arms, feet and back for about ninety seconds, while other warders watched. He was then thrown into his cell and left without food or water until the following morning. The author submits that he was denied access to a doctor or any sort of medical treatment.

3.4 The author reported these assaults to the Prison Authorities and repeatedly requested medical attention, to no avail. He then wrote to the Prison Ombudsman; as a result, he was finally taken to hospital in early 1992. The doctor who treated him prescribed pain killers. On the sequels of the beatings, the author notes that: "There is a specific pain in the left part of my back which has never completely disappeared. It feels as if there is a broken bone or that a bone is cracked. I experience the pain particularly badly in the morning when I wake up. All my requests to see a doctor again have been in vain and the warders simply give me pain tablets [...]".

3.5 The author further states that on several occasions warders told him that there was no point in providing him with medical treatment, because he was about to be executed. He submits that this caused him "great embarrassment and depression". Furthermore, on three occasions he was not allowed out of his cell for an entire day, and was given no food or water. Thus, he remained confined to his cell from around 4:00 p.m. until 10:00 a.m. two days later. The author characterizes the situation as "extremely discomforting and humiliating".

3.6 By letter of 9 June 1993, the author submits that, on 5 June 1993 at 12:28 p.m., he was harassed by a warder, one M., reportedly because he had complained to the Ombudsman and to "the Human Rights Office" about the treatment by warders. M. allegedly hit the author on his knee with a baton, and when the author held on to the baton, M. drew a knife. He alleges that M. was about to use the knife but that it fell from his hand. The author then reported the incident to the officer-in-charge of the Section, who referred him to the Prison Superintendent; the latter allegedly refused to see him. The author further alleges that, on 4 May 1993, a warder stuck a finger in his eye and that he was kicked several times as he lay on the floor. The same warder subjected him to further physical and verbal abuse on 23, 24, 29 and 30 September 1993. On 30 September the author's room was searched and 200 dollars removed, which have not been returned.

3.7 Counsel refers to the records of a meeting held on 25 January 1993 with the author's local lawyer. This lawyer observed that Mr. Leslie displayed a number of new cuts and bruises on his face which the lawyer did not recall from their first meeting in 1989. The lawyer suspected that this was the result of treatment in prison, which is not uncommon in Jamaica. Counsel submits that this lawyer's observations corroborate all the allegations made by the author in his statement and letters. Counsel, on behalf of Mr. Leslie, has lodged formal complaints with the Prison Superintendent on 30 November 1993, and with the Jamaican Commissioner of Prisons on 14 March 1994.

3.8 Counsel adduces documentary evidence of the inhuman conditions of detention at the General Penitentiary and St. Catherine District Prison. It is submitted that the lack of recreation, rehabilitation and other facilities in these prisons clearly indicates that they fall far short of the U.N. Standard Minimum Rules for the Treatment of Prisoners, and that the lack of provision for the basic needs for Junior Leslie amounts to a violation of both articles 7 and 10, paragraph 1. He concludes that the lack of washing facilities in custody, the crowded conditions under which Mr. Leslie was detained, the long periods of confinement, the lack of medical treatment, the reasons given for the denial of such treatment, and the unprovoked assaults by the police officer and prison warders to which Mr. Leslie was subjected, amount to violations of articles 7 and 10, paragraph 1.

3.9 It is further alleged that the author did not have a fair trial. He complains that his legal aid counsel failed to adequately prepare the case. In this respect he claims that he met his lawyer for the first time on one of the twelve occasions on which his trial was adjourned. Although the attorney visited him several times in prison, a policeman was always present, which afforded no privacy. Only the adjournment and new dates for the trial were discussed, never the defence arguments. This is said to violate article 14, paragraph 3 (b).

3.10 In respect of the alleged violation of article 14, paragraphs 1 and 3 (e), it is submitted that due to lack of time and facilities for the preparation of the defence, a number of witnesses were not called to testify on the author's behalf. The author's defence was further prejudiced by the fact that junior counsel, who had been assigned to the author's attorney to assist him with the case and on whom the attorney relied for all the groundwork, fell ill shortly before the start of the trial, and could therefore not attend. Furthermore, the trial judge's alleged "obstructive behaviour" prevented the defence from adequately cross-examining the prosecution witnesses on the "short and stout" issue. Counsel concedes that, in principle, it is not for the Committee to review specific instructions given by the judge to the jury, unless it can be ascertained that these instructions were clearly arbitrary or amounted to a denial of justice. In this context, he refers to the summing-up and submits numerous examples of the judge's instructions which are said to amount to a denial of justice.[2]

3.11 As to the adequacy of the author's representation during the trial, it is submitted that prosecution witnesses were not adequately cross-examined, or at all. Counsel points out that the author's attorney arrived late at the afternoon session of the hearing on 3 April 1990, when the pathologist gave evidence in connection with the wounds suffered by the deceased. The attorney did not cross-examine this witness, whose evidence, according to counsel, could have undermined Carol Brown's evidence that her brother had been beaten and stabbed two weeks prior to his death. The lawyer's failure to question the pathologist is said to be particularly serious in light of the fact that a friend of the family of the deceased, who identified the bodies, testified in court that he was not aware that Dalton Brown had been beaten and stabbed.

3.12 Furthermore, counsel argues that Carol Brown's identification evidence, given to the police on the night of the incident, was uncorroborated, as Orlando Campbell did not identify Mr Leslie, and the third eye-witness, C., did not testify.[3] Counsel notes that the author was never placed on an identification parade, and that it was only 29 months later that he was identified in court by Carol Brown. It is submitted that the delay of 29 months from arrest to trial amounts to a violation of article 14, paragraph 3(c), and that the judge, by allowing a dock identification and by failing to warn the jury about the effects the delay might have on the credibility and reliability of the prosecution witnesses, violated the author's right to a fair trial.

3.13 The author alleges that since he was assigned the same attorney for the appeal, his right to legal assistance of his own choosing was violated. He did not meet with the attorney prior to the hearing of the appeal, and was given no opportunity to discuss the grounds of appeal to be argued on his behalf. Furthermore, he claims that he was not asked whether he wished to attend the hearing and that he only learned from the prison authorities that his appeal had been dismissed.

The State party's information and observations on admissibility and the author's comments thereon

4. In its submission under rule 91, the State party argued that the communication was inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, because the author had failed to exhaust domestic remedies. It noted that the author could still apply for constitutional redress; in this context, it noted that the rights invoked by the author and protected by article 14, paragraphs 1, 3 (b) and (e) are coterminous with Sections 20 (1), 20(6)(b) and 20(6)(d) of the Jamaican Constitution. Pursuant to Section 25 of the Constitution, it was open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In his comments, dated 21 April 1995, counsel stated that, since legal aid was not made available for constitutional motions, a constitutional motion did not constitute an effective remedy in the case.

The Committee's admissibility decision

6.1 During its 55th session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that the pursuit of a constitutional remedy was still open to the author. It observed that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. However, it also recalled that the State party had indicated on several occasions[4] that no legal aid was made available for constitutional motions. The Committee considered that in the absence of legal aid, on which the author, who is indigent, must rely, a constitutional motion did not constitute a remedy which needed be exhausted for the purposes of the Optional Protocol. The Committee therefore considered that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

6.3 As to the claims under articles 7 and 10, paragraph 1, the Committee noted that the author brought the repeated instances of ill-treatment to the attention of the prison authorities and the Commissioner of Prisons. As no reply or follow-up was given to his complaints, the Committee considered that, in this respect, the author had met the requirements of article 5, paragraph (2) (b), of the Optional Protocol. It found that the author's claims about ill-treatment in prison and on death row had been sufficiently substantiated, for purposes of admissibility, and should be examined on the merits.

6.4 The Committee further considered that the author had sufficiently substantiated for purposes of admissibility his claim under article 14, paragraph 3 (c), that he was not tried without undue delay. This related in particular to the State party's failure to place the author on an identification parade at the time of his arrest, combined with a lapse of time of two and a half years before a dock identification was made during the trial, by a single witness who was a close relative (daughter and sister respectively) of the two deceased. This allegation should, accordingly, be examined on the merits.

6.5 As to the author's allegations which concerned claims about irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of identification, the late arrival in Court of the attorney and the lack of cross examination of the prosecution witnesses, the Committee reiterated that, while article 14 guarantees the right to a fair trial, it was not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee did not show that the judge's instructions suffered from such defects. Accordingly, this part of the communication was deemed inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.6 On 12 October 1995, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under articles 7, 10, paragraph 1, and 14, paragraph 3, of the Covenant.

State party's merits observations and counsel's comments

7.1 In a submission dated 23 January 1997, the State party informed the Committee that in respect of the alleged violations of articles 7 and 10, paragraph 1, it "has sought to have the matter investigated, but has not yet received a response. Efforts will be made to expedite the investigation. Until this information is received the Ministry cannot offer constructive comments on the allegations". The State party notes that the above comment cannot be construed as acceptance that any of the incidents took place in a manner which breached the Covenant.

7.2 With regard to the claim that the author and his counsel did not have adequate time and facilities to prepare his defence in violation of article 14, paragraph 3 (b), the State party notes that counsel visited the author on several occasions in prison although in presence of a policeman. The State party contends that it was open to the author's counsel to object to the policeman's presence and consequently denies any violation of the Covenant.

7.3 With regard to the alleged breach of article 14, paragraph 3 (c), the State party concedes that a delay of 29 months between arrest and trial is longer than desirable. However, it rejects that these delays constitute a violation of the Covenant, particularly as during that period a preliminary enquiry was held.

7.4 As to the alleged violation of article 14, paragraph 3 (d), because legal aid defence counsel arrived late one of the days of the trial and his failure to adequately cross examine witnesses, the State party categorically denies any breach of the Covenant. It states that the State's obligation is to designate competent counsel and once appointed not to interfere in how the case is conducted. It contends that issues such as professional conduct of attorneys are not the State party's responsibility.

7.5 Concerning the violation of article 14, paragraph 3 (e), because some defence witnesses were not called, the State party notes that this breach cannot be attributed to it, without clear evidence that agents of the State prevented defence counsel from calling these witnesses.

8.1 In his comments on the State party's submission, counsel notes that the State party has not supplied any information with regard to the complaints under articles 7 and 10, paragraph 1.

8.2 As regards the 29 months delay between arrest and trial, counsel notes that the State party has conceded that it is longer than desirable, but asserts that a preliminary enquiry began the trial process. If true, this can only be described as a technical defence. The contentious question remains, which is that the author was only identified in Court 29 months after arrest.

The preliminary enquiry had no bearing on the passage of time before the author's identification took place in Court. Counsel reiterates that article 14 3 (c) was violated.

8.3 Counsel reiterates the claims regarding inadequate representation by defence counsel in Jamaica and rejects the State party's contention that its only responsibility is to designate competent legal aid counsel. In this respect counsel states that it is precisely the very low remuneration (which is a State responsibility) of legal aid counsel that makes it impossible for indigent persons such as the author to have competent counsel assigned to their cases.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's various complaints of ill-treatment while both at the General Penitentiary and then at St. Catherine's District Prison, the Committee notes that the author has made very precise allegations, related to the various instances where he was beaten and to the deplorable conditions of detention, as set out in paragraphs 3.1 to 3.8 supra. None of this has been contested by the State party, except to say some 14 months later that it would investigate. In the Committee's opinion, the conditions described in para 3.1 to 3.8, are such as to violate the author's right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to articles 7 and 10, paragraph 1.

9.3 The author has claimed a violation of article 14, paragraph 3 (c), on account of the undue delay in bringing him to trial 29 months after arrest. The Committee notes that the State party itself admits that a delay of 29 months between arrest and trial "is longer than desirable", but contends that there has been no violation of the Covenant, because a preliminary enquiry took place in that time. The Committee is of the view that the mere affirmation that a delay does not constitute a violation is not sufficient explanation. Therefore, the Committee finds that 29 months to bring an accused to trial does not comply with the minimum guarantees required by article 14. Accordingly, it finds that there has been a violation of article 14 paragraph 3 (c).

9.4 As regards the author's argument that he was not effectively represented on appeal since he was represented by the same counsel as on trial, who failed to consult him, the Committee notes that counsel consulted with the author before the appeal and that he argued grounds of appeal on his behalf. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the Court should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice. In the instant case, nothing in the conduct of the appeal by the author's lawyer shows that he was exercising other than his professional judgement, in the interest of his client. The Committee concludes, therefore, that the information before it does not show that article 14 paragraph 3 (d) has been violated.

9.5 The author has alleged a violation of article 14, paragraph 3 (b) and (e) since the lack of time and facilities for the preparation of the defence meant that a number of defence witnesses were not called to testify on the author's behalf. From the information before it the Committee finds that there is no indication that counsel's decision not to call witnesses was not based on the exercise of his professional judgment. If counsel or the author felt they were unprepared it was incumbent upon them to request an adjournment. Accordingly, there is no basis for finding a violation of article 14, paragraph 3 (b) and (e).

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, and 14 paragraph 3 (c), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Leslie with an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] The Committee's Views on Mr. Finn's Communication, No.617/1995, were adopted on 31 July 1998 at the 63rd session.

[2] All of the grounds of appeal relied on by counsel were dismissed by the Court of Appeal.

[3] This witness could not be located by the police.

[4] See e.g. communications No. 283/1988 (Austin Little v. Jamaica), Views adopted on 1 November 1991; No. 321/1988 (Maurice Thomas v. Jamaica), Views adopted on 19 October 1993; No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), Views adopted on 19 October 1993.

E. Communication No. 569/1993, P. Matthews v. Trinidad and Tobago*
(adopted on 31 March 1998, sixty-second session)

Submitted by:	Patterson Matthews
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	11 October 1993
Date of decision on admissibility:	13 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1998,

Having concluded its consideration of communication No.569/1993 submitted to the Human Rights Committee by Mr. Patterson Matthews, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Patterson Matthews, a Trinidadian citizen currently detained at Carrera Convict Prison in Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations of his human rights by Trinidad and Tobago.

Facts as submitted by the author

2.1 The author was arrested on a capital charge in late June 1982. On 25 November 1985, he was convicted of manslaughter and sentenced to 20 years' imprisonment and 20 strokes. The Court of Appeal of Trinidad and Tobago dismissed his appeal on 1 July 1987. The author did not apply for special leave to appeal to the Judicial Committee of the Privy Council thereafter.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Ms. Christine Chanet, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 In the course of 1988, the author was diagnosed as suffering from glaucoma in his left eye. He claims that ever since, the vision of his left eye has deteriorated, that his vision has become blurred and that he suffers from persistent headaches as a result.

2.3 In May 1991, the author was to undergo eye surgery. He claims that on 10 May 1991, he underwent several blood tests. As test results were unavailable on the scheduled day of the surgery (16 May 1991), the operation was postponed. On 19 May 1991, an attempted mass escape from Carrera Convict Prison failed; the author was accused - wrongly according to him - of having participated in the attempt. Two prison warders allegedly took him aside and severely ill-treated him. Thereafter, Mr. Matthews was locked into a small, unlit, cell for two weeks. He claims that for approximately two months, he could only bathe in sea water.

2.4 According to the author, the Assistant Commissioner of the prison was always aware of his glaucoma, but he failed to provide adequate medical assistance. Mr. Matthews believes that this was because he had written about an incident in the prison which had occurred in November 1988 and in which an inmate was killed by warders. The matter was brought to the attention of the Minister for National Security, who simply referred it back to the prison authorities.

Complaint

3.1 Mr. Matthews contends that between 1990 and 1993, he was denied attendance at an eye clinic in Port-of-Spain on 14 occasions; according to him, an ophthalmologist and registered practitioner at the eye clinic could corroborate his story. The author complained to the Ombudsman and to prison authorities about lack of medical treatment, to no avail.

3.2 The author contends that the prison diet and conditions of detention have contributed to a worsening of his situation. He claims that the prison diet consists of two slices of (mostly dry) bread and a cup of 'sugar water' in the morning, and 1/4 pound of rice with peas and flour at lunch-time. Prison authorities allegedly do not listen to, or transmit, complaints about the daily diet. Food brought by the inmates' relatives allegedly goes to the prison officers' kitchen.

3.3 The author describes the conditions of detention as appalling and inhuman. He notes that he is 'cramped' into a small cell with four inmates, and that the cell 'leaks profusely' during rainfalls, which in turn has increased the incidence of influenza among inmates. There is no medication against influenza in the prison.

3.4 The author alleges that, as a poor person, he cannot pay to file a constitutional motion or obtain legal representation for the purpose. He notes that he cannot even pay for such medication as may be available in the prison infirmary.

State party's submission and author's comments

4.1 In its submission under rule 91, the State party confirms that the author suffers from glaucoma and that he is an out-patient at the eye clinic of the General Hospital, Port-of-Spain; he is examined regularly by a prison medical officer and is prescribed medication. According to the State party, the author visited the eye clinic on 12 occasions between 24 May 1990 and 30 July 1993;

it explains that on other occasions, he could not attend medical appointments because of shortage of staff and lack of transportation. The prison records do not indicate that Mr. Matthews underwent any blood tests or was scheduled for an operation.

4.2 As to the attempted mass escape from the prison, the State party argues that the author was one of the conspirators and that appropriate force was used against him. Subsequently, he was charged with seeking to attempt to escape custody and with leaving his place of work without authority, but was found not guilty, because of insufficient evidence. After the escape, the author and other prisoners were placed in the top security division of the prison, but according to the State party, they continued to receive their daily entitlements to food and hygiene.

4.3 The State party dismisses the author's complaint about inadequate food and diet as ludicrous, and argues that meals served at the prisons are prepared by qualified dietitians under strict sanitary conditions, and fulfil all nutritional requirements.

4.4 The State party concedes that overcrowding exists in all the prisons but refutes the author's claim that the cells leak whenever it rains and that no medication for influenza is available; on the contrary, medication is given to prisoners free of charge. According to the State party, the author was examined by a prison medical officer on 2 February 1994 and found to be physically and mentally fit.

4.5 As to the requirement of exhaustion of domestic remedies, the State party concedes that although legal aid is available for a constitutional motion, such a motion is unlikely to succeed, since the author's complaints do not reveal a violation of any of his fundamental rights under the Constitution. The State party argues that the claims are inadmissible as incompatible with the provisions of the Covenant.

5.1 In his comments, the author reiterates many of his allegations. He contests that he was taken to the eye clinic on the dates of visit scheduled between February 1990 and April 1994, and that failure to take him to these appointments constitutes a deliberate attempt to subject him to degrading treatment. Mr. Matthews reiterates that blood tests were carried out on him and eye surgery was scheduled for 1991. He now states that he suffers from glaucoma in both eyes, and that he only has 15% vision left in his left eye, owing to negligence of prison authorities.

5.2 The author reasserts that the prison diet consists of "sugar water, cocoa water, coffee water and green tea water in the morning and evening, with two breads, one with butter and one with a steamed egg". At lunchtime, he is given pea soup, rice with stones in it, rotten fish, goat meat, liver or chicken. The author notes that he sometimes eats the chicken, as it is not always rotten.

5.3 In another undated letter, the author concedes that he underwent eye surgery sometime between March and May 1992. He again notes that on 21 December 1994 and 21 March 1995, he was scheduled to be taken to the eye clinic for tests but was again not taken there by the prison authorities. He contends that on the last occasion, he was already handcuffed and ready to be taken to the appointment when he was told by warders to shave his beard which, as a Muslim, he refused to do. Prison officers then forcibly shaved his beard and locked him up for three days. The author claims that the forced shaving of his beard amounts to a violation of his freedom of religion and of his right to privacy.

5.4 As to sanitary conditions under which prison food is prepared, Mr. Matthews explains that a small open drainage pipe runs in front of the "rations room", which means that human excrement is exposed at appr. 15 feet from where food is prepared. The dining shed is open-sided and the toilets, which do not have doors, are at a distance of only 8 to 10 feet. He claims that the toilets do not work properly, that buckets of salt water have to be thrown into them, and that swarms of flies invade the dining shed. As a result, many prisoners allegedly suffer from diarrhoea.

5.5 Still concerning the prison diet, the author notes that no allowance is made for inmates with different eating habits. Prisoners who may not drink coffee, green tea or cocoa must drink 'sugar water' or plain water. Milk allegedly is unavailable. The Prison Medical Officer allegedly does not entertain requests for changes in diet, unless the prisoner is seriously ill and must be hospitalized. According to the author, inmates who do not receive food from visiting relatives suffer from malnutrition, weakness and insanity. Concerning medication, it is submitted that the prison infirmary stocks medication in short and irregular supplies; prescribed medication often must be bought outside the prison.

The Committee's admissibility decision

6.1 During its 53rd session, the Committee requested the State party, under rule 91 of the rules of procedure, to provide copies of the author's medical file at Carrera Convict Prison, as well as the results of investigations into the failed mass escape from the prison in May 1991. No reply was received from the State party.

6.2 During its 55th session, the Committee considered the admissibility of the communication. It regretted the lack of cooperation by the State party in not providing the additional information requested by the Committee. In respect of the author's claim that he was not receiving adequate treatment for a glaucoma in his eyes and that prison authorities did not allow him to attend the eye clinic where he was an out-patient, the Committee observed that it transpired from the file that the author had visited the eye clinic regularly and that he had undergone eye surgery between March and May 1992. In that respect, the Committee considered that the author had failed to advance a claim within the meaning of article 2 of the Optional Protocol.

6.3 Concerning the author's claim that he was forced to shave his beard, the Committee observed that Mr. Matthews had not shown what steps, if any, he had taken to bring this matter to the attention of the Trinidadian authorities. This claim was deemed inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.4 As to the claims related to the conditions of the author's detention, the Committee noted that the author had filed complaints on this issue with the Parliamentary Ombudsman. It was not, therefore, precluded under article 5, paragraph 2(b), of the Optional Protocol, from considering the complaint. It also noted that the State party had summarily dismissed the author's claim, but considered that the matter warranted examination on the merits.

6.5 Noting that the author had, in addition to his prison sentence, been sentenced to 20 strokes with a birch, the Committee recalled its General Comment on article 7, which observes that the prohibition of cruel, inhuman or degrading punishment must extend to corporal punishment. It requested the

State party to inform it whether the author's punishment of 20 strokes had been carried out, and whether the State party's legislation continued to provide for corporal punishment.

6.6 On 13 October 1995, the Committee declared the communication admissible under article 7 in so far as it related to the issue of corporal punishment imposed on the author, and article 10, paragraph 1, in respect of the author's conditions of detention.

Examination of the merits

7.1 In submissions dated 17 October and 14 December 1995, the State party provides additional information on the issue of medical treatment of the author's glaucoma, a claim which had been declared inadmissible by the Committee. No information is provided on the issue of the corporal punishment to which Mr. Matthews was sentenced, nor on the conditions of detention to which he is subjected. The Committee regrets the lack of cooperation on the part of the State party in respect of the above issues and reiterates that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party must provide the Committee, in good faith and within the imparted deadlines, with all the information at its disposal. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been sufficiently substantiated.

7.2 Concerning the issue of corporal punishment to which the author was sentenced, the Committee notes that Mr. Matthews himself has not raised this issue in his communication to the Committee. This implies that the punishment, if imposed on him, may not have been carried out. The Committee maintains that corporal punishment is incompatible with the provisions of article 7 of the Covenant[1], but makes no finding in this respect in the present case.

7.3 As to the conditions of detention at Carrera Convict Prison, the Committee notes that the author has made very detailed allegations which have been refuted by the State party as preposterous and exaggerated. On the basis of the information before it, the Committee concludes that the conditions of detention at Carrera Convict Prison described by the author, in particular the sanitary conditions, amount to a violation of article 10, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by Trinidad and Tobago of article 10, paragraph 1, of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the author is entitled to an effective remedy. The State party is under an obligation to take measures to ensure that the author's conditions of detention comply with the requirements of article 10, paragraph 1, of the Covenant so that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] **General Comment No. 20, adopted at the Committee's 44th session, paragraph 5.**

F. Communication No. 577/1994, R. Espinoza de Polay v. Peru*
(adopted on 6 November 1997, sixty-first session)

Submitted by:	Mrs. Rosa Espinoza de Polay
Victim:	The author's husband, Victor Alfredo Polay Campos
State party:	Peru
Date of communication:	5 March 1993 (initial submission)
Date of decision on admissibility:	15 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 November 1997,

Having concluded its consideration of communication No. 577/1994 submitted to the Human Rights Committee by Mrs. Rosa Espinoza de Polay on behalf of her husband, Mr. Victor Alfredo Polay Campos, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Rosa Espinoza de Polay, a Peruvian citizen currently residing in Nantes, France. She submits the communication on behalf of her husband, Victor Alfredo Polay Campos, a Peruvian citizen currently detained at the Maximum Security Prison in the Callao Naval Base, Lima, Peru. She claims that he is the victim of violations by Peru of articles 2, paragraph 1; 7; 10; 14 and 16, of the International Covenant on Civil and Political Rights.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

Facts as submitted by the author

2.1 The author's husband is the leader of the "Revolutionary Movement Túpac Amaru" (Movimiento Revolucionario Túpac Amaru). On 9 June 1992, he was arrested in Lima. On 22 July 1992, he was transferred to the "Miguel Castro Castro" prison in Yanamayo, near the city of Puno which is situated at an altitude of 4,000 metres. Conditions of detention at this prison are said to be inhuman. The author submits that for a period of nine months her husband was in solitary detention for 23 and a half hours a day, in a cell measuring 2 by 2 metres, without electricity or water; he was not allowed to write or to speak to anyone and was only allowed out of his cell once a day, for 30 minutes. The author further submits that the temperature in the prison is constantly between 0 and minus 5 degrees, and that the food is deficient.

2.2 On 3 April 1993, Victor Alfredo Polay Campos was tried in the Yanamayo prison by a so-called "tribunal of faceless judges" established under special anti-terrorist legislation. Such a body consists of judges who are allowed to cover their faces, so as to guarantee their anonymity and prevent them from being targeted by active members of terrorist groups. Mr. Polay Campos was convicted and sentenced to life imprisonment; it is claimed that his access to legal representation and the preparation of his defence were severely restricted. While the author does not specify the crime(s) of which her husband is convicted, it transpires from the file that he was convicted of "aggravated terrorism".

2.3 On 26 April 1993, he was transferred to the Callao Naval Base Prison near Lima. In this connection, the author forwarded a newspaper clipping showing Victor Polay Campos handcuffed and locked up in a cage. The author claims that, during the journey from Yanamayo to Callao, her husband was beaten and administered electric shocks.

2.4 The author further submits that her husband is held in a subterranean cell where sunlight only penetrates for 10 minutes a day, through a small opening in the ceiling. During the first year of his prison sentence, he was not permitted visits by any friends or relatives, nor was he allowed to write to anyone or to receive correspondence. A delegation of the International Committee of the Red Cross has been allowed to visit him.

2.5 As to the requirement of exhaustion of domestic remedies, the author submits that her husband's lawyer appealed against conviction and sentence, but that the Tribunal's Appeal Section confirmed the decision taken at first instance. The author further submits that the lawyer, Dr. Eduardo Diaz Canales, was himself imprisoned in June 1993 solely for having her husband and that since then "everything has been paralysed". On 3 June 1994, Mr. Polay Campos' mother filed with the Constitutional Court a recurso de amparo (request for habeas corpus) on his behalf with respect to his ill-treatment. This action was dismissed, according to the author, on an unspecified date.

2.6 On 3 August 1993, the Constituent Assembly of Peru re-established the death penalty for acts of terrorism. The author fears that this new provision will be applied with retroactive effect to her husband and that, accordingly, he might well be sentenced to death.

2.7 The author does not state whether the same matter has been submitted to another instance of international investigation or settlement. The Committee has ascertained, however, that another case concerning the author's husband was submitted to the Inter-American Commission on Human Rights, where it is registered as case 11.048 but is not currently under examination.

The complaint

3. The author submits that the above situation reveals that her husband is a victim of violations by Peru of article 2, paragraph 1, and articles 7, 10, 14 and 16 of the Covenant.

The State party's information and observations and counsel's comments

4.1 By submission of 1 February 1995, the State party asked the Committee to cease considering the communication, observing that the author had been tried in accordance with the legislation relating to acts of terrorism, in total respect of his human rights. It added that the author was being treated correctly by the prison authorities, as attested to by the periodic visits carried out by delegates of the International Committee of the Red Cross.

4.2 The State party further submitted, in a note verbale dated 1 February 1995, that, with respect to the alleged ill-treatment of the author's husband, he had been visited by delegates of the Red Cross and on 20 December 1994 by the District Attorney and a court-registered doctor. Neither had found any traces of ill-treatment of Mr. Polay Campos, and the muscular contraction condition and the emotional stress he was suffering were described as normal symptoms of incarceration.

4.3 In a further submission dated 21 March 1995, the State party stated that the author had not submitted any new arguments and did not challenge the State party's submission. The State party did not, however, specifically address or refute the author's allegations of ill-treatment and torture of her husband.

5. The author commented on this submission but did not provide new evidence.

The Committee's admissibility decision

6.1 During its 56th session in March 1996, the Committee considered the admissibility of the communication. It noted that a case concerning Mr. Polay Campos had been referred to the Inter-American Commission on Human Rights, where it had been registered as case No. 11.048 in August 1992, but that the Commission had indicated that it had no plans to prepare a report on the case within the next 12 months. In the circumstances, the Committee did not find that it was precluded, under article 5, paragraph 2 (a), of the Optional Protocol, from considering the communication. [1]

6.2 As to the complaint that Mr. Polay Campos had been tortured and subjected to treatment in violation of articles 7 and 10, the Committee considered that the facts as submitted appeared to raise issues under the Covenant, notably under articles 7 and 10 thereof.

6.3 Concerning the claim that the death penalty might be applied retroactively to Mr. Polay Campos, no evidence had been adduced to the effect that the provisions of new Peruvian legislation expanding the application of the death penalty had been retroactively applied to him. Accordingly, the Committee deemed this allegation inadmissible pursuant to article 2 of the Optional Protocol.

6.4 The Committee noted that the author had formulated detailed allegations about her husband's conditions of detention and the alleged incompatibility of the procedure before the Special Military Tribunal with article 14. It took further note of the State party's contention that the criminal proceedings against Mr. Polay Campos had followed established procedures under current Peruvian anti-terrorist legislation. It concluded that this contention was to be examined on the merits.

6.5 On 15 March 1996, therefore, the Committee declared the communication admissible. The State party was requested, in particular, to forward to the Committee copies of the relevant reports of delegates of the International Committee of the Red Cross on their visits to Mr. Polay Campos and of the District Attorney and the doctor who had visited and examined Mr. Polay Campos on 20 December 1994, as well as reports of subsequent visits. The State party was urged to provide Mr. Polay Campos with adequate medical treatment at his place of detention. The State party was further requested to provide detailed information about the operation of special tribunals established under Peruvian anti-terrorist legislation, and about the victim's current conditions of detention.

The State party's observations on the merits

7.1 In three submissions dated 27 August, 12 and 28 November 1996, the State party provided copies of some of the reports requested by the Committee, as well as information about the medical treatment given to Mr. Polay Campos and his current conditions of detention. It did not, however, provide information about Mr. Polay Campos' conditions of detention at the Castro Castro prison at Yanamayo, or about the allegation that he was ill-treated during his transfer from Yanamayo to the maximum security detention facility at the Callao naval base.

7.2 The State party noted that two documents concerning Mr. Polay Campos had been submitted upon his transfer to the Callao Naval Base. One was a psychological evaluation, done on 23 July 1992 in Puno (close to the Yanamayo prison), in which the alleged victim's appearance and health were described as 'normal'; the other was Mr. Polay Campos' file as prepared by a department of the Ministry of Justice.

7.3 As to Mr. Polay Campos' state of health, the State party forwarded copies of three reports. The first, dated 26 April 1993, concluded that his general appearance and health were normal (apreciación general: ... despierto. ... orientado en tiempo, espacio y persona. Algo ansioso, no refiere molestía ninguna). It also noted that Mr. Polay Campos' body bore no scars or other signs of ill-treatment ("... piel y anexos: no signos de lesiones primares y secundarias").

7.4 The second report provided by the State party concerned the visit to Mr. Polay Campos on 20 December 1994 by the District Attorney and a court-registered doctor (see paragraph 4.2 above). It noted that Mr. Polay Campos was indeed suffering from muscular contraction, due primarily to the psychological stress caused by the conditions of his incarceration. It further stated that Mr. Polay Campos was experiencing pain in his left shoulder, to be treated with medication (Piroxican). The report observed that the emotional stress to which the author was subjected would require the prescription of sedatives so that Mr. Polay Campos might sleep properly and, ideally, continued psychological treatment. Otherwise, Mr. Polay Campos was described as being in good health, and the clinical tests carried out on him had not revealed any signs of physical abuse or pressure. Mr. Polay Campos had confirmed that he had received medical attention every two weeks, and that on the last occasion the drug Piroxican had been prescribed; he had further confirmed that every time he experienced health problems he was treated by a doctor and received the appropriate medication. He also received whatever dental treatment was required.

7.5 The third report, drawn up on an unspecified date in 1996, again concluded that Mr. Polay Campos' health was normal (buen estado general, lucido, orientado en espacio, persona y tiempo, comunicativo, entímico asímtomatica - peso 76 kgs), and that there were no signs that, as his mother had reported, his eyesight was deteriorating ("visión y campo visual conservados ..."). This last report includes a summary of all medical visits and lists the medications prescribed for Mr. Polay Campos' treatment. The State party re-emphasized that since his transfer to the Callao naval base, Victor Polay Campos had been receiving medical examinations approximately every two weeks and whenever his condition required. He had received, and continued to receive, psychiatric and dental examinations.

7.6 The State party reiterated that Mr. Polay Campos had also received regular visits from delegates of the International Committee of the Red Cross, who had corroborated the reports on his health given by the doctors of the Callao naval base. It added that it never received any written reports from the Red Cross delegates, as the visits to Mr. Polay Campos were carried out on a confidential basis. According to a list furnished by the State party, Mr. Polay Campos was visited by Red Cross delegates on 21 occasions between early December 1993 and the end of August 1996; from that list, it transpires that the longest lapse of time between two such visits was three months and 28 days (between 25 October 1994 and 22 February 1995).

7.7 As to the current conditions of detention of Victor Polay Campos, the State party provided the following information about his entitlements:

- 30 minutes of daily walk or sport in the prison courtyard;

- One 30-minute visit by two family members per month;
- Three hours weekly to listen to cassettes on a walk-man;
- Laundry once a week;
- One haircut every two weeks;
- Three meals per day;
- Access to reading material and books;
- and possibility to correspond with family members (familiares cercanos).

7.8 The State party did not provide any information about Mr. Polay Campos' trial or about the general procedures followed by the so-called "tribunals of faceless judges". It merely forwarded a copy of the legal opinion of the Prosecutor General (Fiscal supremo) dated 21 April 1993 to the effect that the verdict handed down by the Special Chamber of the Superior Court of Lima (of 3 April 1993) had been arrived at in accordance with procedural requirements, and was therefore valid. The Supreme Court endorsed this conclusion on 24 May 1993. The State party confirmed that the judgment of the Special Chamber of the Superior Court of Lima had become final, and that there was no record of any request for review of the sentence (recurso de revisión) having been filed on behalf of Victor Polay Campos.

Examination on the merits

8.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties to the case, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 Two issues arise in the present case: first, whether the conditions of detention of Mr. Polay Campos, and the ill-treatment he allegedly has been subjected to, amount to a violation of articles 7 and 10 of the Covenant, and, secondly, whether his trial before a panel of anonymous judges ("faceless judges") constituted a violation of article 14, paragraph 1, of the Covenant.

8.3 As to the first issue, the Committee notes that the State party did not provide any information about Mr. Polay Campos' detention at the Castro Castro prison in Yanamayo from 22 July 1992 to 26 April 1993 or on the circumstances of his transfer to the Callao Naval Base, whereas it did provide information on the victim's conditions of detention subsequent to his incarceration at Callao. The Committee deems it appropriate to deal separately with these two distinct periods of detention.

Detention from 22 July 1992 to 26 April 1993 and transfer from Yanamayo to Callao

8.4 The author claims that Victor Polay Campos was detained incommunicado from the time of his arrival at the prison in Yanamayo until his transfer to the Callao Naval Base detention centre. The State party has not refuted this allegation; nor has it denied that Mr. Polay Campos was not allowed to speak or to write to anyone during that time, which also implies that he would have been unable to talk to a legal representative, or that he was kept in his unlit cell for 23 and a half hours a day in freezing temperatures. In the Committee's opinion, these conditions amounted to a violation of article 10, paragraph 1, of the Covenant.

8.5 The author contends that her husband was beaten and subjected to electric shocks during his transfer to the Callao Naval Base facility, and that he was displayed to the media in a cage on that occasion. Although this allegation was not addressed by the State party, the Committee considers that the author did not adequately substantiate her allegation concerning the beating and the administration of electric shocks during the transfer to Callao. It accordingly makes no finding on articles 7 and 10, paragraph 1, of the Covenant on this count. On the other hand, it is beyond dispute that during his transfer to Callao Mr. Polay Campos was displayed to the press in a cage: this, in the Committee's opinion, amounted to degrading treatment contrary to article 7 and to treatment incompatible with article 10, paragraph 1, since it failed to respect Mr. Polay Campos' inherent and individual human dignity.

Detention at Callao from 26 April 1993 to the present

8.6 As to the detention of Victor Polay Campos at Callao, it transpires from the file that he was denied visits by family and relatives for one year following his conviction, i.e. until 3 April 1994. Furthermore, he was unable to receive and to send correspondence. The latter information is corroborated by a letter dated 14 September 1993 from the International Committee of the Red Cross to the author, which indicates that letters from Mr. Polay Campos' family could not be delivered by Red Cross delegates during a visit to him on 22 July 1993, since delivery and exchange of correspondence were still prohibited. In the Committee's opinion, this total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant.

8.7 As to Mr. Polay Campos' general conditions of detention at Callao, the Committee has noted the State party's detailed information about the medical treatment Mr. Polay Campos has received and continues to receive, as well as his entitlements to recreation and sanitation, personal hygiene, access to reading material and ability to correspond with relatives. No information has been provided by the State party on the claim that Mr. Polay Campos continues to be kept in solitary confinement in a cell measuring two metres by two, and that apart from his daily recreation, he cannot see the light of day for more than 10 minutes a day. The Committee expresses serious concern over the latter aspects of Mr. Polay Campos' detention. The Committee finds that the conditions of Mr. Polay Campos' detention, especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes' sunlight a day, constiute treatment contrary to article 7 and article 10, paragraph 1, of the Covenant.

The trial of Mr. Polay Campos

8.8 As to Mr. Polay Campos' trial and conviction on 3 April 1993 by a special tribunal of "faceless judges", no information was made available by the State party, in spite of the Committee's request to this effect in the admissibility decision of 15 March 1996. As indicated by the Committee in its preliminary comments of 25 July 1996 on the Third Periodic Report of Peru and its Concluding Observations of 6 November 1996 [2] on the same report, [3] such trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant. It cannot be held against the author that she furnished little information about her husband's trial: in fact, the very nature of the system of trials by "faceless judges" in a remote prison is predicated on the exclusion of the public from the proceedings. In this situation, the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces. In the Committee's opinion, such a system also fails to safeguard the presumption of innocence, which is guaranteed by article 14, paragraph 2. In the circumstances of the case, the Committee concludes that paragraphs 1, 2 and 3 (b) and (d) of article 14 of the Covenant were violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee constitute violations of article 7 and article 10, paragraph 1, of the Covenant as regards Mr. Polay Campos' detention at Yanamayo, public display in a cage during his transfer to Callao and detention in total isolation during his first year of incarceration at Callao and the conditions of his continuing detention at Callao, and of article 14, paragraph 1, as regards his trial by a tribunal of "faceless judges".

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Victor Polay Campos with an effective remedy. The victim was sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers that Mr. Polay Campos should be released unless Peruvian law provides for the possibility of a fresh trial that does offer all the guarantees required by article 14 of the Covenant.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its

jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] As of October 1997, the situation remained the same.

[2] See the annual report of the Committee for 1996 (A/51/40), paras. 350 and 363.

[3] See document CCPR/C/79/Add.72 (18 November 1996), para. 11.

G. Communication No. 585/1994, T. Jones v. Jamaica*
(adopted on 6 April 1998, sixty-second session)

Submitted by:	Tony Jones (represented by Ms. Victoria Roberts, from Mishcon de Reya Solicitors)
Victim:	The author
State party:	Jamaica
Date of communication:	12 January 1994 (initial submission)
Date of decision on admissibility:	13 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 April 1998,

Having concluded its consideration of communication No.585/1994 submitted to the Human Rights Committee by Mr. Tony Jones, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Tony Jones, a Jamaican citizen who at the time of submission of his complaint was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, 10, 14, paragraphs 1, 2, and 3(a) to (e), and 17 of the International Covenant on Civil and Political Rights. He is represented by Victoria Roberts of the law firm of Mishcon de Reya in London. On 16 May 1995, the author's death sentence was commuted to life imprisonment.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts as submitted by the author

2.1 Tony Jones was arrested on 1 September 1984. On 9 November 1984, he was charged with having murdered, on 6 March 1984, one Rudolph Foster. On 6 March 1985, the author and his co-accused, McCordie Morrison[1], were found guilty as charged and sentenced to death in the St. Elizabeth Circuit Court, Jamaica. The Court of Appeal dismissed the author's appeal on 6 July 1987. On 22 July 1991, the Judicial Committee of the Privy Council denied special leave to appeal.

2.2 At the trial, the case for the prosecution rested on the identification evidence given by one Canute Thompson. The latter testified that in the evening of 6 March 1984, he had witnessed the author and two men attack the deceased. Mr. Thompson testified that he had heard the author tell the deceased "Stand up, or else a kill you blood clat", and that he had seen the author fire three (out of a total of four) shots at the deceased, who was then running towards the witness. Mr. Thompson further testified that he had seen the author's face several times during the incident: he first saw him from the side and then full face for between 5 and 30 seconds; a bright street light had enabled him to see the author's face. In addition , he had recognised the author's voice. Thompson noted that he had known the author for 16 or 17 years, but admitted that he had not seen Mr. Jones for two years before the incident.

2.3 The defence challenged the credibility of Thompson's testimony, as he had held a grudge against the author. The reason for the dispute allegedly was a dispute of a political issue which had resulted in a fight between Mr. Thompson and the author and his co-accused.The author claimed that afterwards, Thompson had denounced him with the foreman of the construction site where they all worked, and that he and Morrison had subsequently been dismissed. Furthermore, after this incident, Mr. Thompson had allegedly threatened the author. During the trial, Mr. Jones made an unsworn statement from the dock, denying any knowledge of the murder.

The complaint

3.1 Counsel claims a violation of article 9, paragraphs 2, 3 and 4, of the Covenant. The author was taken into custody on 1 September 1984 by Denham Town Police, then transferred to the Santa Cruz Police for about two weeks, and then once again transferred to Black River Police Station. Throughout this time, the author allegedly was unaware of the charges he faced, and every time he asked a police officer for information, he was ignored. It was only on or about 9 November 1984 that he was charged with murder and cautioned[2]. Thus, the author was detained for two months before being charged. The author further claims that after his arrest, he was kept handcuffed day and night for at least 2 weeks, until he showed the handcuffs to a Police Superintendent, who removed them.

3.2 According to counsel, there were serious weaknesses in the identification evidence against the author, in that identification occurred at night with inadequate lighting conditions. Moreover, Mr. Thompson only had a few seconds to get a full front view of the assailant. The consecutive periods during which the witness could see the author's face were, respectively, 5, 3 and 30 seconds. It is further submitted that the author was not placed on an identification parade, although the prosecution must conduct an identification parade in cases in which it seeks to rely solely upon identification evidence.

3.3 Counsel argues that the trial judge failed to direct the jury properly on the dangers of convicting on identification evidence alone, especially where the witness only had limited opportunity to observe the assailant, and where no corroborative element for identification had been adduced. This issue was argued before the Judicial Committee of the Privy Council which refused to give leave to appeal on this issue.

3.4 It is submitted that the trial judge violated his obligation of impartiality through the way in which he dealt with the evidence of a possible grudge held by prosecution witness Thompson. Counsel alleges that the judge misdirected the jury, in that he stated that it had not been suggested to Thompson in cross-examination that he bore malice towards the author. Still according to counsel, the judge should have discharged the initial jury, as one juror was seen talking to a member of the deceased's family during the trial. The judge questioned this jury member in the presence of the full jury, but the juror denied that the conversation had taken place.

3.5 Counsel contends that the author did not receive adequate legal representation. Thus, the author only had one brief interview lasting 15 to 20 minutes with his legal aid counsel, approximately ten weeks after arrest. Further, the author allegedly was threatened by police officers to the effect that if any witnesses came forward to testify on his behalf, they would also be imprisoned. Allegedly, as a result, no witnesses were traced or called to testify by the author's representative.

3.6 According to counsel, the author did not have adequate time for the preparation of his defence. He points in this context to the fact that Mr. Thompson, on trial, made reference to a potential witness for the defence. This potential witness might have been prepared to give evidence that Thompson and the author had been involved in a fight.

3.7 With respect to the preparation of the appeal, counsel argues that her client was denied adequate time and facilities, as he never met with his representative for the appeal at any time before the application for leave to appeal was made. It is submitted that the author was not given a fair and public hearing by the Court of Appeal because, as noted in a letter from counsel for the appeal to the author, his case, notably on the ground of insufficient identification evidence, was not fully argued in the Court of Appeal on 6 July 1987.

3.8 Counsel alleges a violation of article 14, paragraphs 3(c) and 5, in that the author's case was not reviewed without undue delay by the Court of Appeal. Thus, over 26 months elapsed between the author's conviction (6 March 1985) and the filing of the grounds of appeal (11 March 1987) and the date on which the Court of Appeal heard and dismissed the appeal (6 July 1987).

3.9 As to the conditions of the author's detention, counsel notes that after the arrest, Mr. Jones was not allowed to speak to members of his family for approximately five weeks, and that he was beaten badly by police officers while in custody. During pre-trial detention (lasting over six months), the author allegedly was not segregated from convicted prisoners, nor was he given treatment appropriate to his status as an unconvicted person. In addition, violence allegedly was used against the author after his conviction, and he was frequently threatened with physical violence and death by warders. Counsel notes that although the author developed arthritis in prison, no medical treatment has been offered.

3.10 The author claims a violation of article 17, paragraph 1, on the ground that his correspondence was repeatedly and unlawfully interfered with by prison guards, and that letters sent by him to and through the prison office have not reached the addressee.

3.11 Counsel finally claims a violation of article 7, as Mr. Jones was detained on death row for over ten years; by reference to the judgment of the Judicial Committee of the Privy Council in the case of *Pratt and Morgan v. Attorney-General of Jamaica*, it is submitted that the time spent on death row constitutes cruel, inhuman and degrading treatment.

State party's submission and author's comments

4.1 By submission of 22 February 1995, the State party offers both comments on admissibility and merits. It argues that the claims under article 9, paragraphs 2 to 4, are inadmissible for failure to exhaust available domestic remedies: there are remedies for the alleged violation by way of action for unlawful imprisonment. Until and unless the author has sought redress for these violations, the claims cannot be entertained by the Committee.

4.2 The State party contends that the alleged violations of article 14, paragraph 1, in as far as they concern the conduct of the trial by the judge, relate to matters of facts and evidence in the case, the review of which is outside the competence of the Committee.

4.3 As to the claim of inadequate legal aid representation of the author, the State party points out that it cannot be held responsible for the actions of legal aid counsel once it appointed a competent legal representative and did not obstruct him in the performance of his duties. Otherwise, the State party would incur a greater responsibility with respect to legal aid counsel than exists for privately retained counsel. Similarly, the State party argues that it cannot be held responsible for the alleged failure of author's counsel for the appeal to prepare the appeal diligently, provided there has been no obstruction on the part of the authorities.

4.4 The State party denies that there is any evidence whatsoever that police officers threatened potential defense witnesses. It emphasizes that the fact that potential defence witnesses were not called to testify is not a matter that could be attributed to the State.

4.5 The State party notes that it will investigate the allegation that the author's case was not fully argued before the Court of Appeal; it does however point out that the Judicial Committee of the Privy Council did examine the issue of identification evidence and thus rejects that there was a breach of article 14, paragraph 5. In the same vein, it denies that a period of 26 months between the filing and the hearing of the author's appeal constitutes undue delay.

4.6 The State party rejects the assertion that Mr. Jones was not permitted to speak to family members for five weeks after his arrest, or that he was not segregated from convicted prisoners prior to his trial. It does however promise that the allegations of use of violence against the author will be investigated, and that inquiries will be made as to whether the author received medical treatment for arthritis.

4.7 Finally, the State party denies that the length of the author's detention on death row amounts to a violation of article 7, and asserts that there is no evidence of any breach of article 17, paragraph 1.

5.1 In her comments, counsel requests that the question of the admissibility and the merits be dealt with separately. On the claims under article 9, she notes that the author was never informed by his Jamaican lawyer or the authorities that a remedy for unlawful imprisonment or detention was available. Counsel notes that it is unclear whether any action would now be statute-barred and, if not, whether legal aid would be made available to the author to pursue such a remedy. For counsel, if an action for unlawful imprisonment were not now available to Mr. Jones and if legal aid were not made available, the claim under article 9 should be declared admissible.

5.2 Counsel reiterates the allegation pertaining to inadequate legal representation of his client for the trial, as well as the claim related to the alleged attempt of police officers to prevent witnesses from testifying on the author's behalf. It is alleged that it is common practice in Jamaica to pay witnesses to give evidence and that Mr. Jones was unable to provide the necessary funds. In this respect, it is submitted that Jamaica is responsible for a judicial system which condones the payment of defence witnesses by defendants prior to them being prepared to testify.

5.3 As to Mr. Jones' representation on appeal, counsel argues that the author met the lawyer only once, that he was not informed of the grounds of appeal until after it was dismissed, and that he had thus no opportunity to help prepare the appeal. The only contact the author had with counsel after the appeal was an undated letter informing him that there was "nothing further (that) can reasonably (be done)".

5.4 As to the claim of undue delay in the hearing of the appeal, counsel once again refers to the judgment of the Privy Council in *Pratt and Morgan*, where it was held that a capital appeal should be heard within (at most) 12 months of conviction.

5.5 Counsel reasserts that Mr. Jones had no contact with any member of his family for five weeks after his arrest - since he was moved twice during the first 2 months of his incarceration, his family was uncertain of his whereabouts and did not visit him.

5.6 According to counsel, the State party is well aware of incidents of physical violence against the author during his incarceration on death row. He refers to a letter from the Parliamentary Ombudsman dated 9 November 1989, in response to a complaint about an assault the author had suffered and which had not been investigated and punished. As to the lack of medical treatment for the author's arthritis, counsel notes that by letter of 16 October 1994, the Parliamentary Ombudsman directed the Superintendent of St. Catherine District Prison to ensure that Mr. Jones would get appropriate treatment.

5.7 Counsel reaffirms that the Privy Council's judgment in *Pratt and Morgan* is a strong authority for the contention that Mr. Jones' detention on death row for over ten years constituted cruel and inhuman treatment.

The Committee's admissibility decision

6.1 During its 55th session, the Committee considered the admissibility of the communication.

6.2 As to the claims related to interference with correspondence (article 17, paragraph 1) and failure to segregate the author from convicted prisoners (art. 10, para. 2(a)), the Committee noted that the author had not shown what steps, if any, he had taken to bring these matters to the attention of the judicial authorities. In this respect, the requirements of article 5, paragraph 2(b), of the Protocol had not been met.

6.3 Concerning the allegations pertaining to the conduct of the trial and the judge's instructions to the jury, the Committee reiterated that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and the evidence in any given case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee did not show that the trial suffered from such defects. This part of the complaint was thus inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Protocol.

6.4 The Committee concluded that Mr. Jones had failed to substantiate, for purposes of admissibility, the claim that he was denied a fair hearing because the judge failed to discharge the initial jury after one juror was seen talking with a member of the family of the deceased. The judge did in fact examine this matter, and the trial transcript does not contain any information which would have corroborated the author's claim. The claim was thus inadmissible under article 2 of the Protocol.

6.5 Equally, the Committee considered that the author had failed to substantiate his claim that he could not obtain the attendance of witnesses on his behalf and that he was threatened by police officers that potential defence witnesses would also be detained. As to his allegation that one potential witness was prepared to give evidence on his behalf, the Committee noted that the defence had in fact expressly renounced to call this witness. This claim, therefore, was also inadmissible under article 2 of the Protocol.

6.6 In respect of the claim under article 14, paragraphs 3 (c) and 5, the Committee concluded that Mr. Jones had failed to substantiate, for purposes of admissibility, any circumstances which would have made the lapse of time between the filing of grounds of appeal and the actual hearing of the appeal unduly long, within the meaning of article 14, paragraph 3 (c). This claim was deemed inadmissible under article 2 of the Protocol.

6.7 Concerning the claim of interference with the author's mail, the Committee observed that counsel had failed to demonstrate what steps, if any, had been taken to bring this matter to the attention of the prison authorities or the judicial authorities. In this respect, accordingly, the requirements of article 5(2)(b) of the Protocol had not been met.

6.8 Regarding the claim under article 7, on account of prolonged detention on death row, the Committee reaffirmed its jurisprudence according to which detention on death row for prolonged periods of time would not constitute a violation of article 7 of the Covenant in the absence of some further compelling circumstances. The author had not substantiated any further specific circumstances, over and above the length of confinement to death row, which would raise an issue under article 7. This claim, accordingly, was inadmissible under article 2 of the Protocol.

6.9 Concerning the claims under article 9, the Committee took note of the State party's claim that remedies remained open to the author, but observed that the author was not charged or brought before a judge for (at least) two months after his arrest. It considered that the State party had failed to provide details of how this remedy would have been available to Mr. Jones in the circumstances of his case, and concluded that article 5(2)(b) of the Optional Protocol did not preclude it from considering the claim.

6.10 The Committee considered that two further allegations had been sufficiently substantiated and thus warranted consideration on the merits: (a) the claim that the author's representation on appeal had been inadequate appeared to raise issues under article 14, paragraph 3(b); (b) the claim of ill-treatment during detention and the alleged denial of medical treatment in respect of which the State party had promised an investigation might raise issues under article 10.

6.11 On 13 October 1995, the Committee declared the case admissible under articles 9 (as to the claim that Mr. Jones was not promptly informed of the reasons for his arrest and of charges against him nor brought before a judge), 10, paragraph 1, (as to ill-treatment after conviction and denial of medical treatment) and 14, paragraph 3(b) (as to the representation on appeal), of the Covenant.

State party's observations on the merits and counsel's comments

7.1 By submission of 13 January 1997, the State party denies any violation of the Covenant. In respect of article 9, it contends that, at the time of his arrest, Mr. Jones was informed in general terms of the charge against him. Furthermore, as he was tried six months after his arrest, this implies that a preliminary inquiry "must have been held before this in several sessions. In these circumstances, the Ministry denies that the author was not brought promptly before a magistrate."

7.2 As to the allegations under article 10(1), the State party asserts that its investigations show that "within the resources available, the author was treated for his arthritis". Concerning the alleged ill-treatment of the author, it is submitted that "[d]ates, names and other specific details are needed in order for the Ministry to effectively investigate the author's allegations of ill-treatment".

7.3 Concerning the alleged inadequate representation of the author on appeal, the State party contends that without a copy of counsel's letter to the author, from which it is said to transpire that the issue of identification was not fully argued on 6 July 1987, it cannot properly investigate the allegation. The State party reaffirms that it cannot be held responsible for the way in which a competent legal aid counsel conducts the defence of his client.

8.1 In comments, counsel asserts that Mr. Jones was, prior to 9 November 1984, unaware of even the general nature of the charge against him; after that date, he had a short (15-20 minutes) meeting with his legal aid attorney, Mr. Clarke. Mr. Clarke represented the author during the preliminary inquiry, which took place on 30 January 1985 before The Hon. D.A. Hugh, Resident Magistrate for the Parish of Manchester. Mr. Clarke represented the author during the trial.

8.2 On the claims under article 10, counsel observes that the State party's authorities were informed of the author's arthritic condition in September 1994 and 1995 and August 1996. In spite of visits by the Inspector (of Prisons) in April and September 1996, Mr. Jones has still not received any medication for his arthritic condition.
Concerning the instances of Mr. Jones' ill-treatment, counsel recalls that the State party authorities were always notified promptly and fully about the incidents which took place in May 1990, October 1993 and May 1995:
* On 28 May 1990, the author was twice hit in the face by a prison officer during disturbances at St. Catherine District Prison;
* On 31 October 1994, the author was assaulted by a soldier and a warder known as "Paddy foot" and was subjected to constant threats by "Paddy foot", as Mr. Jones had said that he would testify about an incident involving a prison warder known to "Paddy foot" in which 4 inmates were killed;
* On 30 May 1995, the author was hit in the mouth by warder Page, after

"Paddy foot's" transfer to another prison, as a result of the author's complaint against him. On the same day, Mr. Jones was denied food and not allowed to visit the surgery.

8.3 Counsel's allegations were transmitted to the State party on 25 June 1997. The State party has not provided any observations with regard to these allegations.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information which has been made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee has noted the State party's assertion that the author was informed in general terms of the charge against him upon arrest. This contrasts with the author's claim that he was unaware of even the general nature of the charge against him for ten weeks after his arrest. The Committee considers that the material before it does not justify the finding of a violation of article 9, paragraph 2.

9.3 As to article 9, paragraph 3, the State states the author was promptly brought before a magistrate and refers in this context to the fact that a preliminary hearing was conducted prior to the trial. This does not invalidate the author's claim (corroborated by evidence given by a police officer at the trial) that he was not brought before a judge until ten weeks after arrest. The Committee finds that this delay is not compatible with the requirements of article 9, paragraph 3, of the Covenant.

9.4 In respect of the claims under article 10, the Committee notes that, again, the State party observes that its investigations show that the author did receive treatment for his arthritic condition, while the author denies that any treatment was provided. In the circumstances, the Committee considers that a violation of article 10 in this respect has not been established. As to the beatings to which the author allegedly was subjected, the State party merely notes that it would need details and names for the matter to be investigated, while the author gives both dates and details of the incidents during which he sustained beatings. The Committee observes that it was incumbent upon the State party to investigate the author's allegations, which were sufficiently precise, in good faith. Moreover, it has not been contested that the author did notify the prison authorities after these incidents. The Committee therefore concludes that the beatings Mr. Jones sustained in May 1990, October 1993 and May 1995 violated his right, under article 10, paragraph 1, to be treated with humanity and respect for the inherent dignity of his person.

9.5 With regard to counsel's claim that the author was not effectively represented on appeal, the Committee notes that the author's legal representative on appeal conceded that there was no merit in the appeal. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the

Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Jones should have been informed that his legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him.[3] The Committee concludes that there has been a violation of article 14, paragraph 3 (d).

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations by Jamaica of articles 9, paragraph 3, 10, paragraph 1, and 14, paragraph 3 (d), of the Covenant.

11. Under article 2, paragraph 3(a), of the Covenant, Mr. Tony Jones is entitled to an effective remedy, which should include release and compensation for the treatment to which he was subjected. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State Party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] Communication No. 663/1995.

[2] In correspondence with his London lawyers, the author states that he doesn't remember the exact date on which he was charged with murder, but estimates the date at about 9 November 1984. At the trial, a police officer testified that he cautioned the author and executed the warrant for his arrest on 14 November 1984.

[3] See Views on communication No. 461/1991 (Morrison and Graham v. Jamaica), adopted on 25 March 1996, paragraph 10.5, and communication No. 537/1993 (Kelly v. Jamaica), adopted on 17 July 1996, paragraph 9.5.

H. Communication No. 591/1994, I. Chung v. Jamaica*
(adopted on 9 April 1998, sixty-second session)

Submitted by: Ian Chung (represented by Mr. Saul Lehrfreund from Simons, Muirhead & Burton)

Victim: The author

State party: Jamaica

Date of communication: 1 December 1993 (initial submission)

Date of decision on admissibility: 13 October 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 April 1998,

Having concluded its consideration of communication No.591/1994 submitted to the Human Rights Committee by Mr. Ian Chung, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ian Chung, a Jamaican citizen who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 2 and 3(g), of the International Covenant on Civil and Political Rights. He is represented by Saul Lehrfreund of the London law firm of Simons Muirhead and Burton. On 11 July 1995, the author's death sentence was commuted to one of life imprisonment.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts as submitted by the author

2.1 Ian Chung was arrested together with two co-defendants, Dwayne Hylton[1] and Dennie Wilson, and charged with the murder, on 21 August 1986, of a taxi driver. He was tried in the Manchester Circuit Court (Mandeville District), found guilty as charged and sentenced to death on 26 May 1988, together with his co-defendants. The Court of Appeal dismissed the appeal on 16 May 1990. A subsequent petition for special leave to appeal was dismissed by the Judicial Committee of the Privy Council on 21 June 1993.

2.2 The prosecution's case was that the author and his co-defendants had, during the night of 6 to 7 July 1986 and after a visit to a discotheque in Mandeville, boarded a taxi and then stabbed its driver, who died of the stab injuries. A witness for the prosecution, who initially was charged along with the defendants, testified that he had seen the taxi with the defendants on board and entered it himself, only to find a dead body lying in the car. He left the vehicle in Kingston, after having been threatened by the author not to reveal anything to the police.

2.3 On trial, the prosecution presented as evidence statements which had been given by the defendants to the police after their arrest and after having been cautioned. From the statements, it transpired that the author and the co-defendants wanted to leave Jamaica as stowaways on a ship. They had promised the taxi driver money to drive them to Kingston but then killed him, since they were penniless. In his statement, the author indicated that he was told by one of the co-defendants to cut the taxi driver's throat, but that he had aimed his knife at the victim's chest instead, as he did not want to kill him. The victim was placed in the trunk of the taxi and abandoned next to a mud lake. When driving away, the three realized that the victim was still alive - one of the co-defendants left the car and stabbed the victim in the back.

2.4 According to the forensic evidence tendered during the trial, the deep cut on the chest, allegedly the result of the author's stab, could have caused the victim's death by itself, as it had punctured the heart at its base.

2.5 During the trial, the author made an unsworn statement from the dock, stating that he had been at the discotheque until 11:30 p.m. on 6 July 1986, and then returned home with some friends in the taxi in question. He argued that the police had forced him to sign the statement later produced as evidence by the prosecution. After a voir dire, the trial judge admitted said statement as evidence.

The complaint

3.1 The author contends that during interrogation by three policemen at Mandeville Police Station on 21 August 1986, he was brutally beaten by one of the investigating officers. He claims that he was threatened with a gun; under duress, he agreed to sign a prepared statement to avoid further beatings and stress. At this moment, the author was without legal representation. It is said that this treatment violated articles 7, 10, paragraph 1, and 14, paragraph 3 (g), of the Covenant.

3.2 It is submitted that the author and his co-defendants were brutalized and terrorized , mentally and physically, by members of the public every time they attended the court sessions; Mr. Chung adds that his family and legal representative were also threatened. At the start of the trial, counsel requested a change of venue as, in the circumstances, the author's defence was highly prejudiced and his client would be deprived of a fair trial. He also pointed out that the pre-trial publicity given to the case had severely prejudiced the public, including all of the jurors drawn from the Parish of Manchester, who would be prejudiced against the author. This, it is argued, violated the author's right to a fair trial and his right to be presumed innocent until found guilty.

3.3 Counsel argues that the judge erred in not leaving the issue of manslaughter to the jury's consideration. On the basis of the statement given to the police, many doubts about the author's intentions remained, which would have precluded a verdict of guilty of murder. Counsel contends that the judge's instructions to the jury amounted to a denial of justice, in violation of article 14, paragraph 1. The death sentence pronounced against the author allegedly violated article 6, paragraph 2, as it was imposed upon conclusion of a trial which did not meet the requirements of article 14.

3.4 The author submits that during his incarceration on death row, he was subjected to beatings and other forms of ill-treatment, in violaton of articles 7 and 10, paragraph 1. He notes that after one inmate had been beaten to death in front of his cell by warders in 1989, warders returned the following day and beat him up as well. Although he suffered a kidney injury, he was left in his cell for a full four days before he was brought to a hospital. Mr. Chung complained about this treatment to the Parliamentary Ombudsman, by letters of 12 January and 10 September 1989. Subsequently, counsel requested information from the Ombudsman's Office about the author's complaints, to no avail.

3.5 It is submitted that the period of confinement to death row - from May 1986 to July 1995 - amounts to a violation of article 7 of the Covenant. Reference is made to the judgment of the Judicial Committee of the Privy Council in the case of *Pratt and Morgan v. Attorney-General of Jamaica*.

State party's submission on admissibility and counsel's comments

4.1 By submission dated 17 February 1995, the State party argues that the judgment of the Privy Council in *Pratt and Morgan* is no authority for the proposition that the execution of an individual detained on death row for over five years automatically constitutes cruel and inhuman treatment contrary to the Jamaican Constitution. It refers to the Committee's own Views on the above case, where it was held that prolonged judicial proceedings and detention on death row did not per se constitute cruel, inhuman and degrading treatment.

4.2 The State party notes that the author's claims under articles 7, 10 and 14(3)(g) concerning ill-treatment during police interrogation were examined in a voir dire during the trial. Thus, the claims were subject to judicial scrutiny at a time when the author was represented. As the judge was not satisfied of the accuracy of the allegations, and these claims being related to the evaluation of evidence in the case, the State party considers that they are inadmissible *ratione materiae*, as incompatible with the provisions of the Covenant.

4.3 As to the author's alleged ill-treatment in 1989, the State party promises an investigation of the matter. It adds that its readiness to investigate the author's claim does not in any way imply that it accepts the assertion that the Parliamentary Ombudsman routinely fails to investigate such claims. Nor does the State party accept that death row inmates are generally afraid to notify the authorities of instances of ill-treatment: the Inspectorate of the Ministry of National Security and Justice is investigating several cases of allegations of ill-treatment of inmates.

4.4 According to the State party, there was no violation of article 14, paragraph 1, because of the judge's refusal to change the trial venue and his failure to put the possibility of a manslaughter verdict to the jury: both issues relate to matters of evaluation of facts and evidence. On the issue of change of trial venue, Section 34 of the Judicature (Supreme Court) Act allows a judge to grant a change of venue where good cause is shown: in the author's case, the judge exercised her discretion and did not allow such a change. The State party argues that the exercise of such discretion is not a matter to be considered by the Committee, unless there was a flagrant violation of fundamental rights.

4.5 As to whether the issue of manslaughter should have been left to the jury, the State party notes that this issue was properly examined by the Court of Appeal. For the State party, " .... in a situation where a determination depends on an assessment of facts and evidence, [the Committee] is in no position to hold that there has been a breach of the Covenant, unless [there was] a case of flagrant abuse of fundamental rights".

5.1 In his comments, counsel challenges the State party's interpretation of the Privy Council's judgment in *Pratt and Morgan* on the death row phenomenon. He asserts that the Judicial Committee's Guidelines apply to all prisoners on death row incarcerated for over five years - if detention on death row exceeds five years, then this constitutes *per se* cruel, inhuman and degrading treatment.

5.2 Counsel argues that the examination, in a voir dire during the trial, of the alleged ill-treatment of the author in police interrogation, does not relate to evaluation of facts and evidence and thus cannot be considered an admissibility issue; rather, this is a matter to be examined on its merits.

5.3 As to Mr. Chung's ill-treatment on death row, counsel recalls that the author made separate complaints to the Office of the Parliamentary

Ombudsman, who replied on 2 February and 26 September 1989 assuring the author that the complaints would receive prompt attention. Counsel himself wrote to the Office of the Ombudsman on 15 September and 19 October 1993 to request further details on his client's complaint - no reply was received.

5.4 Counsel reiterates that Mr. Chung's claim of harassment and brutalization on the occasion of his attendance at the trial in Manchester Circuit Court points to gross and flagrant violations of article 14, paragraphs 1 and 2. These claims have nothing to do with evaluation of facts and evidence in the case and thus deserve consideration on the merits.

Committee's admissibility decision

6.1 During its 55th session, the Committee considered the admissibility of the case. On the death row phenomenon claim (article 7), it recalled that detention on death row for any specific period of time would not amount to a violation of article 7 in the absence of further compelling circumstances[2]. In this case, the author had not substantiated the existence of further compelling circumstances which would raise an issue under article 7 of the Covenant. This part of the complaint was thus inadmissible under article 2 of the Optional Protocol.

6.2 On the issue of the author's alleged ill-treatment during interrogation, the Committee noted the State party's argument that as these claims were the subject of a voir dire during the trial and found to be lacking in substance, they concerned the evaluation of facts and evidence and thus should be held inadmissible. The alleged forced confession of the author was considered in detail during the trial and left for the jury to evaluate. The Committee reiterated its jurisprudence on the issue of evaluation of facts and evidence, which are best left for the appellate courts of States parties to decide, and the instructions of the trial judge to the jury, which the Committee could not generally challenge unless the instructions were clearly arbitrary or amounted to a denial of justice. There was no evidence that the judge's decision to admit the author's caution statement as evidence or her instructions to the jury suffered from such defects. This part of the case was thus inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

6.3 The Committee reached the same conclusion with respect to the author's claim that the judge erred in not leaving the possibility of a verdict of manslaughter to the jury. The material before the Committee did not show that the judge's instructions to the jury on this issue were manifestly arbitrary or amounted to a denial of justice.

6.4 The Committee noted the claim that Mr. Chung's trial was unfair because of the pressure he and his co-defendants were subjected to in the Manchester Circuit Court, and the judge's refusal to change the venue of the trial. It did not accept the State party's contention that the judge's exercise of discretion not to change the venue had to be subsumed under the evaluation of facts and evidence - the author's claim suggested an

atmosphere of hostility and bias which might have had a bearing on his right to a fair trial before an independent and impartial tribunal; this matter should be considered on its merits.

6.5 The Committee regretted that the State party had not provided it with information about the results of its investigation into the author's ill-treatment by warders on death row. The author's claim that his attempts to bring his grievances to the attention of prison authorities and the Parliamentary Ombudsman had not been challenged. In the circumstances, the Committee concluded that the author had met the requirements of article 5, paragraph 2(b), of the Optional Protocol.

6.6 On 13 October 1995, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 10, paragraph 1, and 14, paragraphs 1 and 2, of the Covenant.

State party's merits observations and counsel's comments

7.1 By submission of 13 January 1997, the State party contends that its investigation has not substantiated the author's allegation that he was ill-treated by warders on death row - therefore, it denies any violation of articles 7 and 10, paragraph 1.

7.2 The State party denies a violation of article 14, paragraphs 1 and 2, because of the pressure the author and his lawyer allegedly were subjected to in the Manchester Circuit Court, and the judge's refusal to change the venue. It reiterates that the exercise of the judge's discretion is a matter of evaluation of facts - an application for a change of venue must be based on the presentation of particular facts. It would be for the judge who was present in the same environment to make an evaluation of the situation and to exercise his discretion. The exercise of his discretion would be reviewed by appellate instances, a matter which the Committee has no jurisdiction to examine.

7.3 In his comments, counsel observes that the State party has rejected the author's claim of ill-treatment by warders on death row in blanket terms: he notes that the State party has not provided any information as to what investigations were carried out, what the actual findings were, nor who carried out the investigations. Nor does the State party's blanket denial of a violation of articles 7 and 10(1) challenge the author's contention that his efforts to bring his grievances to the attention of the authorities and the Parliamentary Ombudsman were unsuccessful.

7.4 As to the trial judge's refusal to change the venue, author's counsel reiterates that *if* there is a possibility that Mr. Chung's defence was prejudiced in such a way as to deprive him of his right to a fair trial before an independent tribunal, then the Committee must have jurisdiction to consider the complaint on its merits.

Examination on the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information which has been made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee has noted the State party's argument that investigations into the allegations of ill-treatment of Mr. Chung have not substantiated his version of beatings and ill-treatment sustained while on death row. It observes that the State party has not indicated whether a formal report on the result of these investigations was issued, nor who investigated the claim and when it was investigated. On the other hand, Mr. Chung has given a detailed account of the beatings he sustained at the hand of warders in 1989. The Committee recalls that a State party is under the obligation to investigate seriously allegations of violations of the Covenant made under the Optional Protocol procedure.[3] This entails forwarding the outcome of the investigations to the Committee, in detail and without undue delay. In the absence of a detailed reply from the State party, due weight must be given to the author's allegations. The Committee finds that the ill-treatment described by the author constitutes a violation of articles 7 and 10, paragraph 1, of the Covenant.

8.3 As to the claim that the trial judge's refusal to change the venue of the trial deprived Mr. Chung of a fair trial and of his right to be presumed innocent, the Committee notes that the request for a change of venue was examined in detail by the judge at the start of the trial (pages 3 to 11 of the trial transcript). The judge heard both Mr. Chung's representative and the Deputy Director of Public Prosecutions on the issue; she noted that the author's fears related to expressions of hostility towards him which well preceded the trial, and that the author was the only one, out of five co-accused, to have requested a change in venue. After hearing the parties' submissions and having satisfied herself that the jurors had been selected properly, she exercised her discretion and allowed the trial to proceed in the parish of Manchester. The Committee does not consider, in these circumstances, that the judge's decision not to change the venue deprived the author of his right to a fair trial or to be presumed innocent until found guilty. An element of discretion is necessary in decisions such as the judge's on the venue issue, and barring any evidence of arbitrariness or manifest inequity of the decision, the Committee is not in a position to substitute its findings for those of the trial judge. Accordingly, there has been no violation of articles 14, paragraphs 1 and 2, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Jamaica of articles 7 and 10, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3 (a) of the Covenant, Ian Chung is entitled to an effective remedy entailing compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. On becoming a State party to the Optional Protocol, Jamaica recognized

the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol, it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] **Mr. Hylton's communications to the Committee were registered as cases Nos. 407/1990 and 600/1994 (Views adopted on 8 July 1994 and 6 July 1996, respectively).**

[2] See inadmissibility decision in case No.541/1993 (Errol Simms v. Jamaica), adopted 3 April 1995, paragraph 6.5.

[3] See, *inter alia*, the Committee's Views in case No. 161/1983 (Herrera Rubio v. Colombia), adopted on 2 November 1987.

I. Communication No. 609/1995, Williams v. Jamaica* (adopted on 4 November 1997, sixty-first session)

Submitted by:	Nathaniel Williams [represented by the London law firm of Nabarro Nathanson]
Victim:	The author
State party:	Jamaica
Date of communication:	30 November 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 November 1997,

Having concluded its consideration of communication No. 609/1995 submitted to the Human Rights Committee on behalf of Mr. Nathaniel Williams under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Nathaniel Williams, a Jamaican citizen who at the time of submission of his communication was under sentence of death at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7 and 10 of the International Covenant on Civil and Political Rights. He is represented by George Brown of the London law firm of Nabarro Nathanson. On 22 November 1995, the Government of Jamaica advised that the author's death sentence had been commuted to life imprisonment on the advice of the Jamaican Privy Council.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts as submitted

2.1 The author was convicted of murder and sentenced to death on 1 December 1988 in the Home Circuit Court of Kingston. The Court of Appeal of Jamaica dismissed his appeal on 4 December 1990. The author considered petitioning the Judicial Committee of the Privy Council for special leave to appeal, but senior counsel advised that an application to the Judicial Committee would have no prospect of success. Subsequent to the enactment of the Offenses against the Person (Amendment) Act in 1992, the author's crime was classified as capital murder. The author served notice of his intention to appeal the classification of his crime on 9 February 1993.

2.2 During the trial, the prosecution submitted that the author had been employed by an elderly couple, Mr. and Mrs. Silvela, over a period of several years. The working relationship soured, and Mrs. Silvela allegedly had told the author to leave the house by the morning of 29 June 1986. In the morning of 29 June 1986, Mr. and Mrs. Silvela and the latter's sister were discovered dead and brutally mutilated. On 15 July 1986 at approximately 2:00 a.m., a district constable went to the home of the author's sister, where Mr. Williams told him that he had killed Mr. and Mrs. Silvela as well as the latter's sister. He added that Mrs. Silvela had intended to reduce his weekly salary from fifty to forty dollars, and that she and her husband had entered his room, destroyed his radio and thrown stones and bottles at him.

2.3 Counsel indicates that at the time of the trial in December 1988, the author already displayed signs of mental disturbance. He refers in this context to the author's replies to the three charges levelled against him at the trial ("blood cloth, raas cloth", "bombo cloth, blood cloth, raas cloth", "bombo clath, raas clath. I don't know nothing about that"). The author was indeed examined by a psychiatrist either immediately prior to or during the trial, who diagnosed the author as merely suffering from a mild reactive depression. Counsel nonetheless suggests that the fact that the author appeared to have carried out the killings with little if any motivation and the gruesome and bizarre circumstances of the crime indicate that Mr. Williams was, at the time of committal of the murders, at least mentally unbalanced.

2.4 Counsel indicates that he has received correspondence from inmates on death row which states that the author has severe mental problems and is unable to write himself[1]. He further refers to an initial report on a psychiatric examination of the author carried out by one Dr. A. Irons on 14 March 1992. This report observes that the author "had four sticks of wooden matches occluding his left external auditory conduct(ear) which he explained was to shut out the 'voices' which he constantly heard discussing him". The report continues that the author "was very distractible and admitted to auditory hallucinations which disturbed him constantly. He also admits to feelings of depression and tearfulness which led to him jumping into a deep sanitary pit in an attempt to end his own life". The doctor diagnosed the author as suffering from schizophrenia of a paranoid type, unspecified personality disorder and anxiety and depression, in keeping with the circumstances of his incarceration. He recommended that the author should benefit from regular psychotropic medication.

2.5 On 18 December 1992, counsel visited the author on death row. He concluded that Mr. Williams did not understand the questions which he put to him, and that he did not have any recollection of either the trial or the appeal. A senior prison officer as well as other inmates on death row told counsel that the author was ill. This information notwithstanding, counsel has found it impossible to obtain further evidence about the author's mental state, despite repeated requests for authorization of a further medical examination, addressed directly to the prison authorities or through the Jamaica Council for Human Rights.

The complaint

3.1 Counsel contends that his client is a victim of a violation of article 6 of the Covenant. He refers in this context to the Committee's Views on communications Nos. 146/1983 and 148-154/1983[2], where it was held that the requirement that the right to life shall be protected by law and that no one shall be arbitrarily deprived of his life implies that the law must strictly control the circumstances in which a person is deprived of his life by State authorities. It is submitted that the circumstances in the present case strongly suggest that Mr. Williams is insane and thus should not be subject to the death penalty.

3.2 Counsel argues that the author is a victim of a violation of articles 7 and 10, in the light of the circumstances set out in paragraphs 2.3 to 2.5 above: the execution of an insane person makes it inhuman. It is further claimed that Mr. Williams is not receiving proper medical treatment for his severe mental disorder, which is said to constitute an additional breach of articles 7 and 10(1).

3.3 From his conviction in December 1988 to the commutation of his sentence in 1995, the author was detained in the death row section of St. Catherine District Prison, i.e. for close to seven years. Counsel observes that the agony and mental strain resulting from such prolonged detention on death row, during which the inmate must constantly face the prospect of his imminent execution, amounts to cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant.

3.4 It is finally submitted that to keep an individual in the author's state of mental health on death row constitutes a violation of articles 7 and 10 and of article 6. Counsel further invokes articles 22 to 26 of the UN Standard Minimum Rules for the Treatment of Prisoners: to attempt to execute an insane or mentally disturbed individual is said to amount to a breach of customary international law. Counsel concedes that he has been unable to obtain a detailed medical report in his client's case on account of the difficulties in securing the services of a psychiatrist in Jamaica and the inadequacies of medical facilities at St. Catherine District Prison. He submits however that it is abundantly clear from the information available that the author is severely mentally disturbed.

State party's observations and counsel's comments

4.1 By submission of 25 April 1995, the State party offers comments both on the admissibility and merits of the communication. On admissibility, it notes that Section 110 of the Jamaican Constitution grants a right of appeal to the Judicial Committee of the Privy Council, and the Poor Prisoners Defense Act provides for legal aid for the purpose. As the author failed to avail himself of his right of appeal to the Judicial

Committee, the State party argues that the requirements of article 5, paragraph 2(b), of the Optional Protocol have not been met. Furthermore, as to the alleged breach of article 6 of the Covenant, the author's failure to appeal against the classification of his conviction as capital murder is equally said not to meet the requirements of article 5, paragraph 2(b).

4.2 On the merits, the State party denies that there has been a breach of article 6. The right to life is fully protected under Jamaican law (Section 14 of the Constitution) and the execution of a death sentence on an individual convicted of murder after the completion of the due process of law clearly satisfies the requirements of article 6. The State party submits that Mr. Williams' alleged insanity is not a relevant consideration for the purpose of determining whether there has been a breach of article 6 in the instant case or as a matter of principle.

4.3 As to the allegation that the author's execution would constitute a violation of article 6, because of his mental condition, the State party notes that it will carry out investigations to ascertain the mental health of the author, and that further information will be transmitted upon completion of the investigations. As of mid-September 1997, no such information had been received by the Committee.

4.4 As to the allegation that the prolonged detention of the author on death row (six years and six months by the time of the State party's submission), the State party points out that the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in the case of Pratt and Morgan v. Attorney-General of Jamaica, which is adduced in support of the allegation, should not be seen as prejudging all other cases in which an individual has been detained on death row for more than five years. Rather, each case must be examined on its own merits. The State party recalls that the Committee's jurisprudence on the death row phenomenon, as formulated in the Committee's Views on the case of Pratt and Morgan[3], holds that prolonged judicial proceedings do not per se constitute a violation of article 7 even if they can be a source of mental strain for the convicted prisoner, and that a case by case assessment would be necessary in capital punishment cases. The State party concludes that there is no automatic violation of articles 7 and 10(1) as a result of the fact that an inmate was confined to death row for more than five years.

5.1 In his comments, counsel refutes that Section 110 of the Jamaican Constitution grants a right of appeal in the circumstances of his client's case. He argues that the amount of legal aid provided under the Poor Prisoners Defense Act for purposes of petitioning the Judicial Committee is wholly inadequate. Finally, counsel notes that an experienced Leading Counsel advised that in the author's case, a petition for special leave to appeal to the Judicial Committee would have no prospect of success. It is thus contended that available domestic remedies have been exhausted for the purposes of article 5, paragraph 2(b), of the Optional Protocol.

5.2 Counsel refutes the State party's argument that Mr. Williams did not appeal against classification of his sentence as capital murder and points out that Mr. Williams' appeal against classification was in fact heard on 22 March 1995 and dismissed.

5.3 On issues relating to article 6, counsel concedes that there has been no formal diagnosis of insanity in the author's case but argues that this is due to lack of medical care provided by St. Catherine District Prison. Thus, the Department of Correctional Services confirmed that the author had been listed for medical examination by a psychiatrist since 29 September 1994; counsel has been unable to establish whether any treatment has been given to the author since that time[4]. He claims that it is established jurisprudence in the common law of Jamaica not to execute those who are insane. The State party's inability to confirm that the author is not insane is said to prove the inadequacy of the correctional services.

5.4 As to allegations concerning the death row phenomenon, counsel submits that to have remained on death row for well over six years constitutes a violation of articles 7 and 10, paragraph 1, of the Covenant. He argues that in Pratt and Morgan, the Judicial Committee did not want to establish a rigid timetable as to the length of detention on death row which could not be regarded as inhuman and degrading treatment. He also points out that it is "well known" and documented in reports prepared by several non-governmental organizations that the conditions of detention at St. Catherine District Prison fall far below acceptable standards. In counsel's opinion, if five years and more on death row give "strong grounds" for believing that the delay is such as to constitute inhuman and degrading punishment, it *definitely* becomes inhuman and degrading if combined with the deplorable conditions of detention inside St. Catherine District Prison.

Decision on admissibility and examination on the merits

6.1 The Committee has considered the present communication in the light of all the information provided by the parties, as required by article 5, paragraph 1, of the Optional Protocol. It notes that the State party has argued that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, as Mr. Williams failed to petition the Judicial Committee of the Privy Council for special leave to appeal, and because he failed to appeal against classification of his sentence as capital murder. The Committee notes first that it is uncontested that leading counsel in the case had advised that a petition to the Judicial Committee would have no prospect of success; in the circumstances, such a petition would not constitute a remedy which is both available and effective. Moreover, it has remained uncontested that the author's appeal against the classification of his sentence was in fact heard and dismissed on 22 March 1995[5]. Finally, the Committee considers that after the commutation of the author's death sentence by the Governor-General of Jamaica, a petition for special leave to appeal to the Judicial Committee of the Privy Council would serve little purpose.

6.2 As to counsel's claim that the execution of a mentally disturbed individual like Mr. Williams would constitute a violation of articles 6 and 7 of the Covenant, the Committee considers that this has become moot with the commutation of the death sentence.

6.3 The Committee considers that the other claims relating to the death row phenomenon and the lack of treatment of the author's mental disorder are admissible and proceeds without further delay to the examination of their substance.

6.4 Counsel has claimed a violation of articles 7 and 10, paragraph 1, because of the length of the author's detention on death row, which, at the time of submission of the communication was six years and by the time of commutation of the sentence nearly seven years. The Committee reiterates its jurisprudence that prolonged detention on death row does not per se amount to a violation of articles 7 and 10, paragraph 1, of the Covenant in the absence of further compelling circumstances. On the other hand, each case must be considered on its own merits, bearing in mind the psychological impact of detention on death row on the convicted prisoner[6].

6.5 In the instant case, the material before the Committee indicates that the author's mental condition seriously deteriorated during his incarceration on death row. This conclusion is buttressed by the correspondence addressed to the Committee on the author's behalf by other inmates on death row, and by the report prepared by Dr. Irons on his examination of the author on 14 March 1992 (see paragraph 2.4 above). On the other hand, the State party, which had promised to investigate the author's state of mental health and to forward its findings to the Committee, has failed to do so, more than two years after its submission. Finally, it is not apparent that the psychiatric examination which had been scheduled for the author in September 1994 by the State party's Department of Correctional Services has been carried out since that date. All these factors justify the conclusion that the author did not receive any or received inadequate medical treatment for his mental condition while detained on death row. This situation constitutes a violation of articles 7 and 10, paragraph 1, of the Covenant, since the author was subjected to inhuman treatment and was not treated with respect for the inherent dignity of his person.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

8. Pursuant to article 2, paragraph 3(a), of the Covenant, the author is entitled to an effective remedy, including in particular to appropriate medical treatment.

9. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] There are several letters in the case file written on Mr. Williams' behalf by another inmate, Everton Bailey.

[2] Baboeram-Adhin et al. v. Suriname, Views adopted on 4 April 1985.

[3] Communications Nos. 210/1986 and 225/1987 (Pratt and Morgan v. Jamaica); Views adopted 5 April 1989, paragraph 13.6.

[4] Counsel's comments are dated 14 June 1995.

[5] i.e. shortly before the transmittal of the State party's submission.

[6] See Committee's Views on communication No. 606/1994 (Clement Francis v. Jamaica), adopted on 25 July 1995, paragraph 9.1.

J. Communication No. 615/1995, B. Young v. Jamaica*
(adopted on 4 November 1997, sixty-first session)

Submitted by:	Byron Young [represented by Kingsley Napley, a London law firm]
Victim:	The author
State party:	Jamaica
Date of communication:	13 January 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 November 1997,

Having concluded its consideration of communication No. 615/1995 submitted to the Human Rights Committee on behalf of Mr. Byron Young under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Byron Young, a Jamaican citizen who at the time of submission of the communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 14 and 15 of the International Covenant on Civil and Political Rights. He is represented by Mr. David Smythe of the London law firm of Kingsley Napley. On 8 September 1995, counsel informed the Committee that the death sentence against his client had been commuted to life imprisonment.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion signed by one Committee member is attached.

The facts as submitted

2.1 On 25 April 1990, the author and three co-defendants were convicted of the murder, on 24 January 1989, of one Elijah McLean, and sentenced to death. Their appeals were dismissed by the Court of Appeal of Jamaica on 16 March 1992. On 11 January 1995, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal. It is submitted that with this, all available remedies have been exhausted. Subsequently, the offence of which the author was convicted was classified as a capital offence under the Offences against the Person (Amendment) Act, 1992.

2.2 At the trial, the prosecution argued that the four accused were among seven men who entered the house of the deceased in the early morning of 24 January 1989, dragged him out of his bed, took him out of the house into the yard and slashed him several times with their machetes, thereby causing his death.

2.3 The prosecution relied primarily on the evidence of three relatives of the deceased, aged 11, 14 and 17 at the time of the crime, and who lived in the deceased's house. They testified that they were woken up by sounds emanating from the room in which the deceased and his common law wife were sleeping. They went to the doorway and saw the author - whom they knew - holding a flashlight in one hand and a gun in the other, pointed at the deceased. Six other men carrying machetes were also standing by the bed of the deceased, and one of them hit him on the forehead. All seven then pulled the deceased from his bed and carried him outside. The deceased held onto one of the doors and was hit on his hand by one of the men. The witnesses further testified that, once in the yard, he was slashed several times by six of the men, while the author stood in their midst, with the gun still in his hand. Thereafter, all seven men left.

2.4 The author's defence was based on alibi. He made an unsworn statement from the dock, simply indicating that he had no knowledge of the murder. Therefore, the issue was one of identification and the defence was solely directed at the eyewitnesses' credibility and their ability, given the lighting conditions in the room and the yard at the time of the incident, to identify the author and the co-accused correctly. On trial, the author was represented by a legal aid attorney. No witnesses were called to testify on the author's behalf.

2.5 Upon conclusion of the judge's summing-up, the jury retired, at 2:31 p.m. It returned at 3:14 p.m. to inform the judge that it had been unable to arrive at a unanimous verdict. The judge replied that he could not, at that stage, accept anything but a unanimous verdict, and the jury once again retired at 3:16 p.m. The jury returned at 4:27 p.m., and the foreman once again announced that no unanimous verdict had been arrived at. The judge thereupon stated: "I am afraid that this is not a case in which I can accept a majority verdict, this is a murder case and your verdict must be unanimous one way or another. [...] None must be false to the oath he has taken to return a true verdict, but in order to arrive at a collective verdict, a verdict upon which you all agree, there must necessarily be some giving and taking. There will be arguments [...], but at the same time there must be [...] certain adjustment of views. Each of you must listen to the voices of the other and don't be dogmatic about it [...]. None of you should be unwilling to listen to the argument of the other. If any of you have a strong view, or you are in a state of uncertainty, you are not obliged or entitled to sink your view and agree with the majority, but what I tell you to do is to argue out and discuss the matter together and see whether or not you can arrive at a unanimous verdict." The foreman then asked the judge a question related to evaluation of evidence, and after this had been explained, the jury retired a third time at 4:41 p.m. It returned at 5:30 p.m., and the foreman announced that the jury had reached a unanimous verdict, finding all four accused guilty as charged.

2.6 Counsel forwards the sworn affidavits from Terence Douglas and Daphne Harrison, two jury members who sat throughout the trial and were present during the deliberations of the jury.

2.7 In his affidavit of 3 May 1990, Mr. Douglas states: "[...] On the last day of the trial - out of twelve jurors - only three jurors found the men guilty. Because it was getting late and the foreman was pressuring us, we just told him to do what he wants. The foreman then stood up [...] and said he found all four men guilty. [...] I was inside talking to the three jurors when the foreman turned to me and said he was going to tell the judge that I got money to let the men go. I then told him to go ahead and tell the judge because I can talk for myself. After the case was dismissed I went outside and started to cry because I know that the four men are innocent [...]. I would like the [Jamaica] Council [for Human Rights] to get a re-trial for these men because they did not get a fair trial."

2.8 In her affidavit of 12 June 1990, Ms. Harrison states: "[...] On our first deliberation, nine of us had come to the decision that the quality of the evidence was so poor and conflicting, that we saw no reason why the men should not be acquitted. After the foreman had informed the court that we could not arrive at a unanimous verdict, we were further addressed by the trial judge. However, on our second deliberation, the situation remained the same. On our final deliberation, the nine - eight others and myself - held steadfast to our decision as we genuinely believed that the evidence was poor. However, as it was getting late and we all wanted to go home, and the fact that we were becoming frustrated, we all turned to the foreman and two jurors and said: 'Alright, you can do whatever you want to do, but remember, we are not a party to any guilty verdict.' The foreman then remarked 'I can only hope that when I get out there none of you say anything'." Ms. Harrison further states that she is willing to attest to her statement in any court at any time.

2.9 The author's appeal was based on the trial judge's alleged failure, in his directions to the jury, to highlight certain discrepancies in the evidence of prosecution witnesses, his directions to the jury that their verdict must be unanimous one way or the other, the effect of which is said to have "cajoled" the jury into a verdict of guilty, and his directions to the jurors on the issue of the unsworn statements made by the author and his co-defendants. The appeal was dismissed on all grounds.

2.10 Mr. Young's subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was based inter alia on the following grounds:

- that the trial judge had erred, in his summing up to the jury, by over-emphasizing the requirement of unanimity and by failing to advise the jurors appropriately on their right and duty to disagree;

- that there had been a material irregularity in the course of the trial, in that although nine out of the twelve jurors had intended to acquit the author and his co-defendants, the foreman wrongly and improperly announced to the court that a unanimous verdict had been reached against the author.

2.11 Counsel further explains that the issue of the alleged material irregularity during the course of the jury's deliberations was not raised before the Court of Appeal of Jamaica, apparently because the author's lawyer for the appeal was of the opinion that the judgment of the Judicial Committee of the Privy Council in *Lalchan Nanan v. The State*[1] prevented the Court of Appeal from questioning and investigating the jury's deliberations. He also explains that while the issue was raised in the petition for special leave to appeal to the Privy Council, the Privy Council refused to examine the matter on account of the precedent in *Nanan*.

The complaint

3.1 Counsel argues that the irregularities in the course of the jury's deliberations, as outlined above, constitute a violation of the author's rights under article 14 of the Covenant, notwithstanding the restrictions which are placed upon the State party's courts by established case law and judicial precedents.

3.2 Counsel alleges a violation of article 14, paragraph 3(e), of the Covenant, since the author's legal aid lawyer for the trial failed to call any witnesses for the defence. In that context, he forwards a sworn affidavit dated 22 October 1993, signed by three individuals who state that they had been with the author in a bar from 11:00 p.m. to 4:00 a.m., some seven miles away from the place where the murder occurred, on the night in question. These individuals emphasize that the author had been with them all the time and is thus innocent of the crime he was tried for; they confirm that they were not called to testify during the author's trial.

3.3 Counsel indicates that at the time of the author's trial, only one category of murder resulted in the mandatory imposition of capital punishment. After Mr. Young's conviction, Jamaica passed the Offences against the Person (Amendment) Act 1992, which creates two categories of murder, capital and non-capital. Section 7(4) of the Act provides for the classification of sentences that were passed before the entry into force of the Act as capital or non-capital. Murder must be classified as capital if it is committed, *inter alia*, in the furtherance of robbery, burglary or housebreaking. According to counsel, none of these additional grounds had been invoked by the prosecution at the author's trial and, since the issue was irrelevant at the time of the trial, no determination of fact was made as to whether these additional facts had occurred.

3.4 Section 2(2) of the Act requires, for an individual to be found guilty of capital murder, that he, by his own act, caused the death of, or inflicted or attempted to inflict grievous bodily harm on the victim, or himself used violence. The issue of whether the person identified as Mr. Young had himself inflicted any injury or used direct force against the victim was not considered during the trial, being legally irrelevant then. Counsel contends that under the Act, a convicted prisoner is not allowed to adduce fresh evidence, or to have witnesses examined, when the review concerns a conviction handed down prior to the entry into force of the Amendment Act.

3.5 Counsel submits that to classify the author's conviction as capital murder nearly five years after the trial and to deny him a trial on the above-mentioned issues deprives him of the protection afforded to a person charged with murder after the entry into force of the Act. Moreover, the author was classified as guilty of capital murder on the basis of witness testimony only, and the issue of capital/non-capital murder was not explored at any point prior to or during the trial. It is therefore argued that, under the Amendment Act, the author was denied the opportunity to examine effectively any of the witnesses whose evidence may have had a bearing on the additional grounds now required under the Amendment Act for capital murder. Counsel also submits that the author was deprived of the right to be presumed innocent in respect of the (under the new definition of capital murder) required additional acts/offences. Counsel argues that the above is not only contrary to article 14, but also to article 15.

3.6 Counsel alleges that the author is a victim of a violation of article 7 because of the conditions of his detention. Thus, the author is allowed few visitors, is not permitted to work or to educate himself, and remained (while on death row) confined to a cell measuring 2 square metres. He allegedly suffered ill-treatment at the hands of prison warders, which included theft of personal effects, assault and continued/repeated soaking of his bedding.

3.7 After the commutation of the author's death sentence in mid-1995, counsel abandoned his claims related to alleged violations of article 6 (arbitrary deprivation of life), article 7 (length of detention on death row), and article 15 of the Covenant.

State party's observations

4.1 By submission of 16 June 1995, the State party concedes the admissibility of the communication and provides comments on the merits of the author's claims. It refutes the allegation of the author that he was denied the benefit of the classification process under the Offences against the Person (Amendment) Act 1992, and that but for the failure to address evidence about certain circumstances of the offence of which he was convicted, he would have been entitled to a lighter sentence, in accordance with article 15. In this context, it points out that Section 2(4) of the Act enables convicted prisoners to apply for a review of the classification within 21 days of the notice of classification. That review is conducted by three judges of the Court of Appeal, and the applicant may appear himself or be represented by counsel. The State party notes that Mr. Young failed to avail himself of this possibility of review of the classification; failure to do so cannot be attributed to the State party. In any event, the State party adds, the evidence upon which the author was convicted included evidence of housebreaking, and under Section 2 of the Act, capital murder includes murder committed in the course of burglary or housebreaking. Therefore, under the Amendment Act, the author's conviction was properly classified as a capital crime, and article 15 of the Covenant does not apply.

4.2 The State party asserts that there can be no question of a violation of article 14, paragraph 3(e), because it is not for State party authorities to interfere with the conduct of a case by counsel for the defence. Issues related to the conduct of the defence must be left to the accused and his legal representative, and the fact that Mr. Young's representative did not call any defence witnesses thus cannot be attributed

Decision on admissibility and consideration on the merits

5.1 The Committee has considered the present communication in the light of all the information provided by the parties, as required by article 5, paragraph 1, of the Optional Protocol. It notes that the State party has conceded the admissibility of the communication; it considers that the author's claims relating to article 7 and to article 14 of the Covenant are admissible, and the Committee therefore proceeds directly with their examination on the merits. As counsel for the author no longer relies on the initial claims under articles 6, 7 (concerning the length of the author's detention on death row) and 15, the Committee need not address these issues.

5.2 Counsel claims that Mr. Young is a victim of violation of article 7, in that he was subjected to ill-treatment by prison warders, including assault and repeated soaking of his bedding. The State party has not replied to this allegation, although it had an opportunity to do so. In the circumstances, the Committee concludes that Mr. Young was subjected to degrading treatment, in violation of article 7.

5.3 Concerning article 14, two issues are before the Committee: (a) whether the judge's insistence that the jury must reach a unanimous verdict and the alleged material irregularities in the jury's deliberations constituted a violation of article 14, paragraph 1, and (b) whether defence counsel's failure to call witnesses on the author's behalf during the trial constitutes a violation of article 14, paragraph 3(e).

5.4 The Committee observes that issue of the judge's summing up to the jury and his emphasis that the jury reach a unanimous verdict was examined by the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council, and that both instances found the instructions to be acceptable. It is not for the Committee to review the findings of these bodies in the absence of any indication that their conclusions were arbitrary or otherwise amounted to a denial of justice. As to the alleged irregularities in the jury's deliberations, the Committee notes the sworn affidavits of the two jurors referred to in paragraphs 2.7 and 2.8 above. There is no indication in the present case that the trial itself was unfair, or that jurors made any objection, at the conclusion of the trial, to the instructions which the judge gave the jury at around 4:30 p.m., on 25 April 1990; nor did the jurors object to the jury foreman's announcement that the jury had arrived at a unanimous verdict of "guilty". As these possibilities would have been available, the Committee cannot find that the refusal of the Judicial Committee of the Privy Council to reconsider its conclusions in the case of _Nanan v. The State_ would constitute a violation of article 14 of the Covenant, although the Committee is in no way bound by a State party's jurisprudence.

5.5 As to article 14, paragraph 3(e), it is uncontested that no effort was made to have three potential alibi witnesses testify on the author's behalf during the trial. It cannot be assumed that the judge would have disallowed such a request, had it been made. However, it is not apparent from the material before the Committee and the trial transcript that counsel's decision not to call witnesses was not made in the exercise of his professional judgment. In these circumstances, the failure to examine witnesses on the author's behalf cannot be attributed to the State party,

and there is no basis for a finding of a violation of article 14, paragraph 3(e).

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by Jamaica of article 7 of the Covenant.

7. Under article 2, paragraph 3(a), of the Covenant, Mr. Byron Young is entitled to an effective remedy. The Committee welcomes the commutation of the author's death sentence by the State party in the summer of 1995, but considers that the author is entitled to compensation for the ill-treatment he was subjected to during his detention on death row.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] [1986] 3 AER 248.

APPENDIX

Individual opinion by Mr. Prafullachandra N. Bhagwati

I am in agreement with the Views expressed by the Committee but I would like to add my own reasons to what has been stated in the Views expressed by the Committee.

The verdict of the jury was announced by the foreman on 25 April 1990. The foreman announced that the jury had reached a unanimous verdict of guilty against all the accused. Neither of the two jurors, who subsequently made affidavits stating that in their view the accused were not guilty and that they were not party to the guilty verdict, got up and contradicted the foreman when he said that the verdict was unanimous. If their subsequent version in the affidavits was correct, there is no reason why they should not have told the judge that what the foreman was saying was not correct and that the jury had not reached a unanimous verdict. The only reason given by the two jurors for not contradicting the foreman was that they were pressurised by the foreman and they wanted to go home as it was getting late. This reason can hardly carry conviction. The jurors have to take oath when they are empanelled and it is difficult to believe that the two jurors in question could have violated their oath and allowed the foreman to announce that all the jurors including them had reached the verdict of guilty when in fact they had not, for the only reason that they were pressurised and wanted to go home. In any event, how can the Committee believe the affidavits of persons who were prepared to sanction death penalty for the accused, though in their view the accused were not guilty, merely because they were getting late and wanted to go home. It is therefore not possible for me to accept the affidavits of the two jurors and no reliance can be placed on these affidavits.

It was however contended in the submission made by counsel for the author, that since the State did not file an affidavit disputing the correctness of the affidavits of the two jurors, what was stated in those affidavits must be accepted as correct. In the first place, under the law of Jamaica which is the same as the law in England and the other common law countries where there is jury trial, the jurors cannot be required to disclose which way they voted in the verdict. There is an obligation of confidentiality on them. The State could not have therefore enquired from the other jurors as to what was their verdict and filed an affidavit on the basis of such information. No reference can therefore be drawn from the fact that the State did not file an affidavit contradicting the statements in the affidavits of the two jurors. Moreover, as pointed out by me above, even in the absence of an affidavit from the State, the affidavits of the two jurors are, on account of their inherent infirmity, unacceptable and the Committee cannot place any reliance on them.

I may point out that according to the domestic law of Jamaica as laid down by the Judicial Committee of the Privy Council in Nanan's case, the Court cannot enter the jury box and enquire into the deliberations of the jurors. The Court cannot go behind the verdict as announced by the foreman on behalf of the jurors. The decision in Nanan's case is however not binding on the Committee nor is the Committee governed by the domestic law of Jamaica. The Committee has to test the validity of the verdict on the anvil of article 14 of the Covenant and examine whether the trial was fair and in accordance with the standards and norms laid down in article 14. But, if the affidavits of the two jurors cannot be relied upon, there is nothing on record to show that the trial was unfair or not in compliance with the requirements of article 14.

The reasons given by me in this individual opinion for reaching the conclusion that there was no violation of article 14 are by way elaboration of the reasons set out in the Views expressed by the Committee to which I fully subscribe. I am in agreement with the Committee in taking the view that there was violation of article 7, for which the author is entitled to compensation.

(*Signed*) Prafullachandra N. BHAGWATI

(Original: English)

K. Communication No. 617/1995, A. Finn v. Jamaica*
(adopted on 31 July 1998, sixty-third session)

Submitted by:	Anthony Finn (represented by Ms. Lyanne Loucas of the London law firm of Lovell White Durrant)
Victim:	The author
State party:	Jamaica
Date of communication:	16 January 1995 (initial submission)
Date of decision on admissibility:	17 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 1998,

Having concluded its consideration of communication No.617/1995 submitted to the Human Rights Committee by Anthony Finn, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Anthony Finn, a Jamaican citizen who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 1, 2, 3 (b),(c) and 5, of the International Covenant on Civil and Political Rights. He is represented by Ms. Lyanne Loucas of the London Law firm Lovell White Durrant. The author's death sentence was commuted in early 1995.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 The author was arrested in December 1987, and charged, together with Junior Leslie[1] and one L.T., with the murders, on 8 November 1987, of Mercelin Morris and Dalton Brown. The preliminary hearing was held on 14, 21 and 22 March 1988 at the Kingston Gun Court. On 4 April 1990, the author and Junior Leslie were found guilty as charged and sentenced to death by the Kingston Circuit Court; L.T. was acquitted on the direction of the trial judge at the close of the prosecution's case. The author then applied to the Court of Appeal of Jamaica for leave to appeal against conviction and sentence, but subsequently he signed a notice of abandonment. Nevertheless, the Court of Appeal decided to consider the author's application together with Mr. Leslie's application; it dismissed their appeal on 15 July 1991. The Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on 12 January 1995. With this, it is submitted, all domestic remedies have been exhausted.

2.2 The prosecution relied on the testimony of the daughter [respectively sister], Carol Brown, and grandson [respectively nephew], Orlando Campbell, of the deceased. Carol Brown testified that, on 8 November 1987 at about 8:00 p.m., her mother and Orlando Campbell were inside the house; she herself was sitting at the doorway and her brother, Dalton Brown, was in the yard with a friend, one C. The yard was lit by a 100 watt bulb on the exterior wall, and by lights within the house. Suddenly two armed men, whom she identified as the author and Junior Leslie, entered the yard. Immediately thereafter she heard explosions and she ran away. She stopped two houses further along, heard several more explosions, and saw C. running past her, followed by the author and Junior Leslie, who were still holding guns. Her mother, covered with blood, ran towards her, and told her that her brother had been shot. Her mother and brother died in hospital. Carol Brown testified that she knew the author for about eight years, and that she had last seen him some three to four weeks prior to the incident. With respect to Junior Leslie, she stated that she had first seen him one week prior to the incident, when he was pointed out to her as one of the persons involved in the beating and stabbing of her brother two weeks earlier.

2.3 Orlando Campbell testified that, on the night of the incident, he was in bed when he saw his uncle, Dalton Brown, followed by the author, running into the house. His uncle held on to his grandmother, who tried to block the author. He then saw the author shooting his grandmother. Having turned his face to the wall, he then heard the author calling his uncle, followed by several explosions, and he heard his uncle begging for mercy. More shooting, from different directions, followed and he then heard the author talking to another person. Orlando Campbell testified that he saw the author, whom he knew, leaving through the gate, followed by a short stout person whose face he could not see, and by co-defendant L.T., whom he also knew.

2.4 No identification parade was held in the case; during the trial, i.e. 29 months after the murders, Carol Brown identified the author from the dock.

2.5 The author presented an alibi defence. He testified at the trial, inter alia, that on 8 November 1987 he was at home with his family in the afternoon and that he went to bed at around 9:00 p.m. No witnesses were called on his behalf.

2.6 It appears from the Court of Appeal's written judgment that the author was represented by the same legal aid lawyer that had represented him at trial. It further appears that the lawyer informed the Court that "he had read the record and consulted a colleague, who agreed with him, that there was no arguable point of substance which he could put forward. He had so advised the author who had signed a notice of abandonment". The Court stated: "We do not propose to regard the application as abandoned and will deal with it as if it were still extant". After having reviewed the case, and having dismissed the grounds of appeal argued by Mr. Leslie's lawyer, the Court stated: "With respect to the other applicant (i.e. the author), we are of the view that the case against him was quite strong. Two witnesses, one of whom grew up with him, identified him. [...]. Our review of the facts and circumstances and our analysis of the summing-up compel us to agree entirely with the view expressed by counsel. We were assured by him that he had personally communicated his view to this applicant who signed notice of abandonment."

2.7 The principal grounds on which the author's petition for special leave to appeal was based were that:
-the trial judge failed to prevent a dock identification by Carol Brown of the author;
-the investigating officer was permitted to give evidence that he had taken a statement from the deceased Mercelin Morris and to suggest that the statement implicated the author. It was submitted that the indirect admission of an inculpatory statement by the deceased was improper and highly prejudicial;
-the trial judge perpetuated this injustice by inviting the jury to draw the inference that the deceased implicated the accused;
-the trial judge failed to direct the jury's attention to the specific weaknesses and inconsistencies of the identification evidence given by the prosecution witnesses.

2.8 Counsel refers to the Committee's jurisprudence on the question of whether a constitutional motion is an available remedy which an author should exhaust, in light of article 5, paragraph 2(b), of the Optional Protocol; he contends that this remedy is not available to Mr. Finn because of his lack of funds and the unavailability of legal aid for the purpose of filing a constitutional motion. He concludes that it is extremely difficult to find a Jamaican lawyer who is willing to represent applicants, on a pro bono basis, for the purpose of a constitutional motion, and that it is therefore the State party's inability or unwillingness to provide legal aid for such motions which absolves Mr. Finn from pursuing any constitutional remedies.

The complaint

3.1 With regard to articles 7 and 10, paragraph 1, of the Covenant, counsel points out that the author has been on death row for almost five years now. It is submitted that the "agony of suspense" resulting from such long awaited and expected execution of the death sentence amounts to cruel, inhuman and degrading treatment, as is reflected in the decision of the Judicial Committee of the Privy Council in the case of Earl Pratt and Ivan Morgan v. the Attorney-General of Jamaica[2], and in the decision of the Supreme Court of Zimbabwe in the case of the Catholic Commission for Justice and Peace in Zimbabwe[3]. Counsel concludes that, although the Privy Council suggested a delay of five years as a guideline, the delay in the author's case of four years and nine months is in itself inhuman and degrading, and that, for the reasons set out above, Mr. Finn is unable to file a constitutional motion to test the legality of execution after a delay of four years and nine months.

3.2 Furthermore, counsel refers to a questionnaire completed by the author for the purpose of his communication to the Human Rights Committee, in which he describes, *inter alia*, the circumstances of his arrest and detention by the police. In this context, he claims the following: "Rainy. Curfew 5:00 - 5:30 a.m. Soldiers and police. I was in bed [...] and taken on the road where I joined several other men, who were lying face down on the road. I was ordered to lay face down with the other men. Next. From this scene to the police lock up...I was beaten. Abusive language was used. Threats were made, and against my life. I was ill for quite some time. No medical treatment was given. I made complaints to the high authority at the police station, but my complaint fell on deaf ears; and I was further abused. I also made complaints to my lawyer". It is submitted that the treatment the author was subjected to by the police, and the subsequent lack of medical treatment, is in violation of articles 7 and 10, paragraph 1, of the Covenant, as well as of articles 24, 25 and 26 of the Standard Minimum Rules for the Treatment of Prisoners. It is further submitted that the author has made all reasonable efforts to seek redress for the ill treatment suffered by complaining to the police authorities and to his lawyer, and that he therefore has fulfilled the requirements of article 5, paragraph 2(b), of the Optional Protocol, in respect of this claim.

3.3 Counsel adduces documentary evidence of the inhuman conditions of detention at St. Catherine District Prison. In this context, it is submitted that the prison is holding more than twice the capacity for which it was constructed in the 19th century; that there are no mattresses, other bedding or furniture in the cells; that there is a constant shortage of soap, tooth paste and toilet paper; that there is no integral sanitation in the cells; that the quality of food and drink is very poor; that there are only small air vents through which natural light can enter the cells; that there is a lack of recreational, rehabilitation and other facilities; and that no doctor is attached to the prison with the result that medical problems are generally treated by warders who receive very limited training. The particular circumstances in the author's case are that he is confined to his cell for twenty-two hours each and every day, that he spends this time in darkness, and with nothing to keep him occupied. The conditions under which the author is detained are said to amount to violations of articles 7 and 10, paragraph 1, of the Covenant, as well as of articles 10, 11, 12, 19, 20 and 22 of the Standard Minimum Rules for the Treatment of Prisoners.

3.4 The author claims undue delay in the judicial proceedings against him, in violation of articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant. In this context, he points out that there was a delay of two years and five months between his arrest (early December 1987) and the trial (2 to 4 April 1990).

3.5 It is submitted that the author's rights under article 14, paragraphs 1 and 2, have been violated, because in his summing-up to the jury, the trial judge aggravated the prejudice caused earlier to the author (by the allegedly wrongful admission of hearsay evidence) by referring again to the hearsay evidence and suggesting that it was as a result of that evidence that the author was arrested. The author's rights under these provisions are further said to have been violated because the judge allowed the prosecution witness to identify the author in court.

3.6 As to the preparation of his defence, the author contends that an attorney was first made available to him one month and two weeks after his arrest. He claims that he did not meet with his attorney before the preliminary hearing. He was assigned another lawyer for the trial, and he claims that, prior to the trial, he only met with his lawyer once, and only for fifteen minutes. He further claims that, during the trial, he was not able to discuss the progress of the trial with his lawyer. Finally, in respect of his appeal, he claims that he only met once with his lawyer (who had also represented him at the trial) before the hearing. The above is said to amount to a violation of article 14, paragraph 3(b) and (d).

3.7 As to a violation of article 14, paragraph 5, reference is made to the relevant paragraph in the Court of Appeal's written judgment, where the author's lawyer stated before the Court of Appeal that he could not find any grounds to argue on his client's behalf, and that he had advised his client to this effect, who had consequently signed a notice of abandonment. The author claims, in a letter addressed to London counsel, dated 28 October 1994, that he signed the notice of abandonment of appeal for the following reasons: "The reason [his lawyer] gave me is that my case was in progress at the Appeal Court and he did not have every thing together, so he is trying to put off the case so I must sign this paper. I did not put under pressure to sign the notice, but it seem I was trick into something I did not understand". Counsel submits that it is clear that the author did not understand the legal effect of signing the notice of abandonment and that he believed that this would merely postpone the hearing. He concludes that the author must have been prejudiced by the notice of abandonment of appeal and by the opinion put forward by his lawyer to the Court of Appeal.

The State party's information and observations on admissibility and the author's comments thereon

4.1 In its submission under rule 91, the State party does not contest the admissibility of the communication but rather and in order to expedite consideration of the case offers comments on the merits of the communication.

4.2 The State party by submission dated 6 March 1995, contends that there has been no violation of articles 7 and 10, paragraph 1, of the Covenant on the basis that the Privy Council judgment in Pratt and Morgan is not an authority for the proposition that incarceration on death row for a specific period of time constitutes cruel inhuman and degrading. Each case must be examined on its own facts, in accordance with applicable legal principals.

4.3 With respect to the delay of 2 years and 5 months between arrest and trial, the State party contends that a preliminary hearing was held during that period and that consequently the delay cannot be considered excessive or in violation of articles 7; 9, paragraph 3; and 14, paragraph 3 (c), of the Covenant.

4.4 With respect to the allegations of unfair trial for the wrongful admission of hearsay evidence on the part of the trial judge, in violation of article 14, paragraphs 1 and 2, of the Covenant, the State party refers to the Committee's own jurisprudence, in respect of the evaluation of facts and evidence (Communication No.237/1987).

4.5 With regard to the allegation of a violation of article 14, paragraph 3 (b), because the author was unable to consult with his legal aid attorney, the State party contends that it is unfair to hold the State party accountable for the professional conduct of legal aid counsel.

4.6 Finally, the State party contends that there has been no violation of article 14, paragraph 5, of the Covenant, in the circumstances that surrounded the author's appeal, because even though the author had signed a notice to abandon the appeal, the Court of Appeal ignored this and heard the application.

5.1 In her comments, dated 18 April 1995, counsel objects to the consideration of the merits at this stage. However, she offers comments on the State party's submission, but points out that the State party has not addressed all the claims. In this respect, counsel states that the State party has not rebutted the allegations regarding the author's ill-treatment while in pre-trial detention and at St. Catherine District Prison.

5.2 With regard to the claims of delay; the judges instructions, the dock identification of the author; the State party's responsibility for the professional conduct of legal aid counsel; the abandonment of appeal and the death row phenomenon; counsel reiterates the allegations made in her initial submission.

The Committee's admissibility decision

6.1 During the 58th session, the Human Rights Committee considered the admissibility of the communication.

6.2 The Committee had ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 As to the requirement in article 5, paragraph 2 (b), of the Optional Protocol that domestic remedies be exhausted, the Committee observed that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 12 January 1995, the author had exhausted domestic remedies for purposes of the Optional Protocol.

6.4 The Committee considered that the author and his counsel had sufficiently substantiated his claim for purposes of admissibility, that the communication might raise issues under articles 9, paragraph 3 and 14, paragraph 3 (c), of the Covenant, which need to be examined on the merits.

6.5 With regard to the author's claim that the length of his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee referred to its prior jurisprudence that detention on death row does not *per se* constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant, in the absence of some further compelling circumstances.[4] The Committee observed that the author had not shown which circumstances raised an issue under articles 7 and 10 of the Covenant concerning the length of detention. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.6 As to the claim under articles 7 and 10, paragraph 1, with respect to the author's arrest and his pre-trial detention, and the prison conditions he suffered, while on death row, at St. Catherine's District Prison the Committee noted that he brought the lack of medical treatment to the attention of the authorities and to that of his counsel. As no reply or follow-up was given to his complaints, the Committee considered that, in this respect, the author had met the requirements of article 5, paragraph 2(b), of the Optional Protocol. It found that the author's claims about ill-treatment in detention had been sufficiently substantiated and should be examined on the merits.

6.7 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial in violation of article 14, paragraph 3 (b) and (d), the Committee recalled its prior jurisprudence that it was not for the Committee to question counsel's professional judgment, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there was no reason to believe that counsel was not using his best judgment. Additionally, the Committee recalled that article 14, paragraph 3 (d) does not entitle the accused to choose counsel provided to him free of charge. The Committee found therefore that in this respect, the author had no claim under article 2 of the Optional Protocol.

6.8 With regard to the author's claim concerning his representation on appeal and the circumstances in which he signed a notice of abandonment, the Committee noted from the information before it that counsel did in fact consult with the author prior to the hearing, and that, in accordance with its practice in all capital cases, at the hearing the Court of Appeal examined the case even though the author had signed a notice to abandon the appeal. The Committee recalling its prior jurisprudence considered that this part of the communication was therefore inadmissible, not raising a claim within any of the provisions of the Covenant, under article 2 of the Optional Protocol.

6.9 The author's remaining allegations concerned claims about irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of identification. The Committee reiterated that, while article 14 guarantees the right to a fair trial, it is not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee did not show that the judge's instructions suffered from such defects. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.10 The Human Rights Committee therefore declared the communication admissible in so far as it appeared to raise issues under articles 7, and 10 paragraph 1 in respect of the treatment the author received when he was arrested and the conditions of his imprisonment and articles 9, paragraph 3 and 14, paragraph 3 (c), of the Covenant in respect of the delay in the judicial proceedings.

6.11 Consequently, on 17 October 1996, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under articles 7, 10, paragraph 1, in respect of the treatment the author received when he was arrested and the conditions of his imprisonment and articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant, in respect of the delay in the judicial proceedings.

State party's merits observations and the counsel's comments

7.1 In a submission dated 30 April 1997, the State party addressed the alleged violations of articles 7 and 10, paragraph 1, on the grounds of ill-treatment and lack of medical attention during the author's pre-trial detention. The State party notes that the author complained of the treatment both to the authorities at the police station and to his attorney. The State party finds it difficult to accept that the author's attorney took no steps to address the situation had the author really been ill. It further adds that the State party's own investigations do not support the author's allegations. Consequently, it accepts no breaches of the Covenant.

7.2 With regard to the alleged breach of articles 9, paragraph 3, and 14, paragraph 3 (c), the State party concedes that a delay of two years and five months between arrest and trial is longer than desirable. However, it rejects that this delay constitutes a violation of the Covenant, particularly as during that period a preliminary enquiry was held four months after the arrest.

8.1 In her comments on the State party's submission, counsel informs the Committee of the difficulties she has had trying to contact the author in order to obtain further clarifications regarding his ill-treatment. She notes that the State party has said that if the author's attorney had not acted in respect of the author's complaints of ill-treatment it was probably due to the fact that they were untrue. Counsel interprets the non action in a different manner and states that it is not known what counsel did in respect of the allegations of ill-treatment, the fact that nothing was done could well be interpreted in the sense that despite counsel's best efforts the State party failed to do anything. The State party has said that its own investigations did not support the statements made in the communication, but does not provide any evidence as to what kind of investigation was carried out or by whom. Counsel reiterates her claims that articles 7 and 10, paragraph 1, have been violated.

8.2 As regards the violations of articles 9, paragraph 3, and 14, paragraph 3 (c), counsel reiterates her original claims. She notes that the fact that a preliminary enquiry took place 4 months after arrest does not justify a delay of 25 months in trying the author. Counsel notes that the State party has conceded that a delay of two years and five months it is longer than desirable, but rejects any violation of the Covenant.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's complaints of ill-treatment while in police detention, the Committee notes that author has made very precise allegations relating to the incident in which he was beaten (see paragraph 3.2 supra). It notes the State party's contention that if despite the issue being put to defence counsel nothing was done, it must mean that the author was not truly ill. The Committee reiterates its jurisprudence where it has held that it is insufficient for the State party to simply say that there has been no breach of the Covenant. Consequently, the Committee finds that in the circumstances where the State party has not provided any evidence in respect of the investigation it alleges to have carried out, due weight must be given to the author's allegations. Accordingly, the Committee finds that there has been a violation of articles 7 and 10, paragraph 1, of the Covenant.

9.3 With regard to the conditions of detention while on death row at St. Catherine's District Prison, the Committee notes that the author has made specific allegations about the deplorable conditions of his detention. He claims that he is kept in a cell for twenty-two hours a day, most of the time in enforced darkness with nothing to occupy himself with. The State party has not addressed these specific allegations. In these circumstances, the Committee finds that confining the author under such circumstances constitutes a violation of article 10, paragraph 1, of the Covenant.

9.4 The author has claimed a violation of articles 9, paragraph 3, and 14, paragraph 3 (c), on account of the undue delay in bringing him to trial two years and five months after arrest. The Committee notes that the State party itself admits that a delay of two years and five months between arrest and trial "is longer than desirable", but contends that there has been no violation of the Covenant because a preliminary enquiry took place in that time, within the first four months after arrest. The Committee is of the view that the mere affirmation that a delay does not constitute a violation is not sufficient explanation. The Committee therefore finds that two years and five months to try an accused does not comply with the minimum guarantees required by the Covenant. Consequently, and in the circumstances of the case, the Committee finds that there has been a violation of articles 9, paragraph 3, and 14, paragraph 3 (c).

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Finn with an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] The Committee's Views on Mr. Leslie's communication, No. 564/1993, were adopted on 31 July 1998 at the 63rd session.

[2] Privy Council Appeal No. 10 of 1993; judgment delivered on 2 November 1993.

[3] Judgement No. SC73/93, unreported, delivered on 24 June 1993.

[4] See Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996, paragraphs 8.2 to 8.5.

L. Communication No. 619/1995, F. Deidrick v. Jamaica* (adopted on 9 April 1998, sixty-second session)

Submitted by:	Fray Deidrick (represented by Mr. Saul Lehrfreund)
Victim:	The author
State party:	Jamaica
Date of communication:	18 November 1994 (initial submission)
Date of decision on admissibility:	4 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 April 1998,

Having concluded its consideration of communication No.619/1995 submitted to the Human Rights Committee by Mr. Fray Deidrick, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Fray Deidrick, a Jamaican citizen who, at the time of submission of his complaint, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of violations by Jamaica of articles 7; 10 and 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Saul Lehrfreund of the law firm Simons Muirhead & Burton. The author has been reclassified as non-capital and sentenced to 15 years imprisonment.

The facts as submitted by the author:

2.1 In July 1988, the author and his daughter were arrested and charged with the murder, on 12 July 1988, of one Seymour Williams. The author was found guilty as charged and sentenced to death on 30 June 1989 by the Home Circuit Court, Kingston; his daughter was acquitted. The author appealed against conviction and sentence; the Court of Appeal of Jamaica dismissed his appeal on 22 March 1991. On 7 January 1993, Leading Counsel in London advised that a petition for special leave to appeal to the Judicial Committee of the Privy Council would have no prospect of success.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 The case for the prosecution relied on evidence given by the deceased's family, wife, brother and two sons; all were the author's neighbours. Mrs. Williams testified that, on 12 July 1988, at about 11:00 p.m., she and her husband had seen the author sitting among a group of men. There was an exchange of words between her husband and one of the men; shortly thereafter, the author hit her husband with a brick. She, her husband and her brother-in-law wanted to report the incident to Linstead Police station; not finding anyone there, they returned home. The author was waiting for them; he threw a bottle at Mrs Williams and threatened to kill them. One of the deceased son's testified that the author had chased him with a "butcher's knife". The author had then gone back and attacked Mr. Williams, stabbing Williams in the back. At the same time Diedrick's daughter stuck an object into William's eye. Mr. Williams'son had been unable to help since he was being restrained by a friend of the deceased. The son further testified that the incident had been witnessed by some fifteen people, and that one Mr. Blackwood had tried to intervene, but had himself been stabbed. Mr. Williams died of the stab wounds.

2.3 The investigating officer testified that, the author, when charged with the murder argued that the deceased's family had attacked him, and that he had acted in self-defence. He further testified that he had taken a statement from one Mr. Blackwood and from one Mr. Grandison, that he had submitted these statements, and that he had tried to obtain statements from other witnesses of the incident. The trial transcript reveals that Mr. Blackwood and Mr. Grandison were not subpoenaed but warned and told to attend the preliminary hearing in the case; Mr. Grandison attended court on several occasions, but Mr. Blackwood never did. It further appears that they were never called by the prosecution to testify in the case.

2.4 The author made an unsworn statement from the dock, repeating that the Williams family had attacked him and that he had defended himself with a pocket knife.[1] No witnesses were called to testify on his behalf; it appears from the trial transcript that the author's attorney intended to call a witness but then decided not to do so.

2.5 On appeal, the author was represented by the same attorneys who had represented him and his daughter on trial. The grounds of appeal were based on the trial judge's treatment of certain elements of evidence in the case, his directions to the jury on certain issues, and the fact that he withdrew the issue of manslaughter from consideration by the jury.

2.6 In his advice on the merits of a petition for special leave to appeal to the Judicial Committee of the Privy Council in the case, Leading Counsel stated that: "I cannot see any grounds for attacking either the summing-up or the decision of the jury or the judgment of the Court of Appeal. It seems to me that the directions on self-defence were put in a way which were of distinct advantage to the appellant. The jury was told in no uncertain terms that if they accepted the appellant's version of events, they must acquit. I do not see any ground for attacking the decision of the judge not to leave provocation to the jury".

2.7 The Jamaica Council for Human Rights received a letter, dated 3 February

1993, from the Charlemont Citizen's Association and Charlemont Neighbourhood Watch, who requested the Council's intervention in the author's case. They stated that: "Our concern lies in the fact that two other members of our community who participated in parting both factions and who witnessed what transpired, gave relevant statements to the investigating police which to date have not been submitted in court. These persons are reputable citizens, who witnessed the incident and are still willing and waiting to assist the court in ensuring that justice is done. We find it strange that Deidrick has been sentenced to death based only on statements given by members of the Williams' family who were themselves involved in the fight".

The complaint

3.1 The author claims to be a victim of a violation of articles 7 and 10 of the Covenant, in view of the length of his detention on death row. Counsel notes that, since his conviction on 30 June 1989, the author has been held at St. Catherine District Prison, which means that he has now been on death row for over eight years. Reference is made to the judgment of the Judicial Committee of the Privy Council in the case of Earl Pratt and Ivan Morgan v. Attorney General for Jamaica[2] where it was held, inter alia, that the delay in the carrying out of the execution constitutes cruel, inhuman and degrading treatment. Counsel submits that the delay is per se sufficient to constitute a violation of articles 7 and 10, paragraph 1.

3.2 Counsel also contends that conditions of incarceration at St. Catherine District Prison amount to a violation of the author's rights under articles 7 and 10, paragraph 1. Conditions at the prison have been examined by non-governmental organisations, including Amnesty International, which observed in November 1993 that the prison was holding more than twice the capacity for which it was built in the 19th Century. Facilities provided by the State party are poor: no mattresses, other bedding or furniture in the cells; no integral sanitation; broken plumbing, piles of refuse and open sewers; only artificial lighting in the cells and only small air vents, through which natural light can enter; no employment opportunities available to inmates; no doctor attached to the prison, so that medical problems are generally treated by warders who receive very limited training. The particular impact of these conditions on the author are the following: he is confined to his cell for twenty-two hours every day; he spends most of his waking hours isolated from other men, with nothing whatsoever to keep him occupied; much of his time is spent in enforced darkness. Counsel concludes that fundamental and basic requirements of the UN Standard Minimum Rules for the Treatment of Prisoners have not been met during the author's detention at St. Catherine District Prison, and refers to the Committee's findings in the case of Albert W. Mukong v. Cameroon.[3]

3.3 With reference to the letter from the representatives of the Citizens' Association of the Charlemont Community in Linstead, it is submitted that the failure by the investigating authorities to tender the witness statements as evidence amounts to a violation of article 14, paragraphs 1 and 2. Counsel invokes a judgment of the U.K. Court of Appeal[4], and submits that, although it is not clear whether the DPP and the author's attorney had specifically requested that the statement be produced, the Jamaican police did not investigate the matter properly. He further points out that, had the statements been brought to the attention of counsel, he would have used it as evidence in the author's defence. Counsel concludes that the police had an unequivocal duty to reveal the identity of the witnesses concerned, who did not belong to the family of the deceased, and who had given statements and were willing to testify on the author's behalf during his trial.

3.4 The author concedes that he has not applied to the Supreme (Constitutional) Court of Jamaica for redress. It is argued that a constitutional motion in the Supreme Court would inevitably fail, in light of the precedent set by the Judicial Committee's decisions in DPP v. Nasralla [(1967) 2 ALL ER 161] and Riley et al. v. Attorney General of Jamaica [(1982) 2 ALL ER 469], where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law.

3.5 Regarding the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal, reference is made to Leading counsel's advice on the merits of the case. It is noted that the jurisdiction of the Judicial Committee is confined to ascertaining whether there was an error of law in the proceedings of the first instance or on appeal, and that leave will only be granted if the case is one of general or public importance. The Judicial Committee does not entertain points that were not raised either at the trial nor at the appeal, in accordance with a view that its jurisdiction does not extend to re-trying a criminal case. Therefore, it is submitted, claims under article 14, paragraphs 1 and 2, could not be raised before the Judicial Committee.

The State party's information and observations on admissibility and the author's comments thereon

4.1 By submission of 24 April 1995, the State party argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. It notes that the author may still apply for constitutional redress.

4.2 On the "death row phenomenon" claim, the State party contends that the Privy Council's judgment in Pratt Morgan is not an authority for the proposition that incarceration on death row for a specific period of time constitutes cruel and inhuman treatment. Each case must be examined on its own facts, in accordance with applicable legal principles. The State party refers to the Committee's own Views in Pratt and Morgan, where it was held that delays in judicial proceedings did not per se constitute cruel, inhuman or degrading treatment.

4.3 Concerning the claim that the author was denied a fair and public hearing before an independent and impartial tribunal and the right to be presumed innocent until proven guilty, because of the failure of the investigating authorities to tender the statements of two eyewitness in evidence at the trial, the State party argues that it will investigate this allegation and report to the Committee at a later stage.

5.1 In comments counsel refutes the State party's affirmations that an appeal to the Privy Council is still open to the author. He points out that the author has not petitioned the Privy Council in accordance with the advice he was given in writing by Leading Counsel, because any petition for special leave to appeal, by a poor person must be accompanied by an affidavit in support of the petition, as well as the certificate of Leading Counsel to the effect that the petitioner has reasonable grounds of appeal.

5.2 Counsel refutes the State party's contention that Privy Council's Pratt and Morgan judgment, is not an authority for the principle that the delay in carrying out the death penalty after five years automatically constitutes cruel and inhuman treatment and is therefore unconstitutional.

The Committee's admissibility decision

6.1 During its 57th session, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, the Committee noted the State party's contention that the author had failed to petition the Judicial Committee of the Privy Council for special leave to appeal. The author's failure to petition this body could not, however, be attributed to him, because so as to petition the Judicial Committee as a poor person, the petition must be accompanied by an affidavit in its support as well as the certificate of counsel that the petitioner has reasonable grounds of appeal. The author had not petitioned the Privy Council on the advice he was given in writing by leading Counsel. In this respect, the Committee recalled its constant jurisprudence[5] and found, in the particular circumstances, that the application to the Privy Council could not be considered an effective remedy and does not constitute a remedy which must be exhausted for the purposes of the Optional Protocol.

6.2 Concerning the author's claim that his prolonged detention on death row amounted to a violation of articles 7 and 10 paragraph (1), of the Covenant, the Committee noted that although some national courts of last resort had held that detention on death row for a period of five years or more violated their constitutions or laws, the jurisprudence of the Committee remained that detention on death row for any specific period of time would not constitute violation of article 7 and 10 paragraph 1, of the Covenant in the absence of some further compelling circumstances. Since the author had not adduced any specific circumstances that would raise an issue under articles 7 and 10 paragraph 1 of the Covenant, this part of the communication was deemed inadmissible under article 2 of the Optional Protocol.

6.3 As to the circumstances of Mr. Deidrick's detention the Committee considered that the author had sufficiently substantiated his claim under articles 7 and 10 paragraph 1, for purposes of admissibility.

6.4 The Committee considered that the author's claim that the failure of the investigating authorities to make available, the statements of two witnesses, denied him the right to a fair trial and violated his right to be presumed innocent in violation of article 14, paragraphs 1 and 2 and consequently article 6, of the Covenant, had been sufficiently substantiated for purposes of admissibility. The Committee regretted that the State party had failed to forward to it the findings of its investigations, fourteen months after having promised to do so. The Committee concluded that these claims should be examined on their merits.

State party's merits observations and counsel's comments

7.1 By submission of 24 October 1996, the State party reiterates that the communication is inadmissible and denies any violation of the Covenant. In respect of the exhaustion of domestic remedies, it contends: that, the fact that one leading counsel advised that the petition would not succeed is not an adequate reason for failing to utilise this remedy; that it is a recognised fact that counsel may differ in their interpretation of the same factual situation; that unless the author can demonstrate that it was generally acknowledged by counsel that his petition would not succeed, then the Ministry contends that the failure to exhaust domestic remedies is attributable to the author. The State party rejects the idea that a petition to the Privy Council is not an effective remedy which must be exhausted for purposes of the Optional Protocol.

7.2 As to the allegations concerning the author's conditions of detention at St. Catherine's District Prison, the State party rejects that these constitute a violation of the Covenant. The State party admits that the conditions at the prison are not ideal, this being a direct result of the unavailability of resources, a situation common in developing countries. Nevertheless, it considers that the situation is not so bad as to constitute *per se* a breach of the Covenant.

7.3 Concerning the allegations of unfair trial, in breach of article 14, paragraphs 1 and 2, the statements of two witnesses, the State party contends that the Ministry's investigations reveal that the statements of Mr. Grandison and Mr. Blackwood were requested and supplied by the prosecution to defence counsel Mr. B.E.F. and Mr. A.J.N. The witnesses were not called by the prosecution and the trial transcript does not disclose an application by the defence to call them. The State party dismisses the allegation that the statements were not supplied to the defence as incorrect.

8.1 In comments, counsel submits that the author's conditions of detention at St. Catherine's District Prison include being locked-up in his cell for a period of twenty-three hours per day; no mattress or other bedding is provided, sleeping on a concrete bunk; no integral sanitation, only a slop bucket; no artificial lighting, with natural light entering only through small air vents; the prison is in a deplorable state of disrepair with open sewers, broken plumbing and plies of refuse; woefully inadequate provisions of medical, dental and psychiatric services and the provision of food does not meet the author's nutritional needs.

8.2 On the claims under article 14, paragraphs 1 and 2, counsel reiterates his claim that statements made by reputable witnesses to the police were not submitted in court, denying the author the possibility of cross-examining witnesses on the same terms as the prosecution, and thus denying him adequate facilities for the preparation of his defence. The State party has simply argued that it investigated the matter and that the statement were given by the prosecution to counsel for the author, B.E.F and A.J.N. However, they did not provide affidavits or statements from counsel confirming that they did indeed receive the statements supplied by the prosecution.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the State party's allegation that the communication should be declared inadmissible for non exhaustion of domestic remedies, since the author did not request leave to appeal to the Judicial Committee of the Privy Council. It also notes counsel's allegation that the author did not appeal to the Privy Council on the advice of leading counsel. It remains the jurisprudence of this Committee that an author need only exhaust those domestic remedies which are effective and available. With respect to the author's requirement to petition the Privy Council, the Committee notes that, as already stated in paragraph 6.1 supra, Leading Counsel advised that he could see no grounds to attack the Court of Appeal judgment and accordingly could not issue the certificate necessary to support an Application for Leave to Appeal. Consequently, the Committee need not review its decision on admissibility.

9.3 With regard to the deplorable conditions of detention at St. Catherine's District Prison, the Committee notes that author's counsel has made precise allegations, related thereto, i.e that the author is locked-up in his cell 23 hours a day, no mattress or bedding are provided, that there is lack of artificial light and no integral sanitation, inadequate medical services, deplorable food and no recreational facilities etc. All of this has not been contested by the State party, except in a general manner saying that these conditions affect all prisoners. In the Committee's opinion, the conditions described above, which affect the author directly are such as to violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to the Covenant. It finds that holding a prisoner in such conditions of detention constitutes inhuman treatment in violation of article 10, paragraph 1, and of article 7.

9.4 The author has alleged a violation of article 14, paragraphs 1 and 2, in that statements given by two witnesses to the police were not submitted in court or provided to the accused. This is said to have denied him the possibility of cross-examining other witnesses on the same terms as the prosecution, and thus denied him adequate facilities for the preparation of his defence. Without prior knowledge of the statements, counsel's cross examination of other witnesses was not as effective as it should have been, and the defence was unable to rebut the witness's allegations. The State party has investigated the matter and informed the Committee that the statements were in fact made available to counsel for the defence. The Committee notes, from the information before it, that counsel for the defence had access to the statements, consequently it considers that the State party cannot be held responsible for counsel's actions. Accordingly the Committee finds that there has been no violation of article 14 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Deidrick with an effective remedy, entailing compensation for the conditions of detention suffered while on death row. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in

the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken in connection with the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] The doctor who performed the post mortem examination described the deceased's wounds as "slashing type injuries".

[2] Privy Council Appeal No. 10 of 1993, judgment delivered on 2 November 1993.

[3] Communication No. 458/1991, Views adopted on 21 July 1994; para. 9.3.

[4] In Ivan Fergus (1994) 98 CR App R, the Court of Appeal held that had the police carried out their duty to follow the instructions of the Crown Prosecution Service to take the statements from alibi witnesses, it was unlikely that the appellant would have been convicted.

[5] Communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991.

M. Communication No. 623-624-626-627/1995, V. P. Domukovsky, Z. Tsiklauri, P. Gelbakhiani and I. Dokvadze v. Georgia,* adopted on 6 April 1998, sixty-second session)

Submitted by:	Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze
Victim:	The authors
State party:	Georgia
Date of communication:	22 and 23 December 1994 and 9 July 1995(initial submissions)
Date of decision on admissibility:	5 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 April 1998

Having concluded its consideration of communications No.623/1995, 624/1995, 626/1995, 627/1995 submitted to the Human Rights Committee on behalf of Messrs. Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communications are Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze, three Georgian and one Russian national currently imprisoned in Georgia, the last two under sentence of death. They claim to be victims of violations of articles 7, 9, 10, 12, 14, 15, 19, 21 and 25 of the International Covenant on Civil and Political Rights by Georgia.

1.2 On 5 July 1996, the Committee decided to join the consideration of the communications.

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*The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Christine Chanet, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts as submitted by the authors

2.1 The author of the first communication (No. 623/1995), Mr. Domukovsky, is a Russian national. On 5 October 1993, Mr. Domukovsky and 18 others were brought to trial before the Supreme Court of Georgia on charges of participating in terrorist acts with the aim of weakening the Government's power and of killing the Head of State, Mr. Shevardnadze. On 6 March 1995 Mr. Domukovsky was found guilty and sentenced to 14 years' imprisonment.

2.2 He states that, on 3 February 1993, the Government of Azerbaijan, where he had sought refuge, refused Georgia's request to extradite him and a co-defendant, Mr. P. Gelbakhiani. Thereupon, in April 1993, he was kidnapped from Azerbaijan and illegally arrested. In this context, he states that the President of Georgia has publicly praised the special services which performed the kidnapping as having carried out a splendid operation. The author states that he was beaten upon arrest and kept in detention from 6 April 1993 to 27 May 1993, after which he was transferred to solitary confinement at the KGB, until August 1993. He further claims that his arrest was illegal, because he was a deputy member of the Supreme Soviet of Georgia and as such protected by immunity.

2.3 On 13 August and 11 December 1994 he was severely beaten in his cell, as a result of which he sustained a concussion. He further claims, without giving any details, that he was forced to testify against himself.

2.4 The author states that, on 13 October 1993, his request to be given a copy of the indictment in his native Russian language was refused by the Court, contrary to the applicable legal rules. He further states that he was not given copies of all the material related to the charges against him. Furthermore, he alleges that the judge on several occasions prevented him from meeting with his legal representatives. In this context, he states that he had to apply to the judge for permission to see his lawyer. He claims that the failure to give him unhindered access to counsel violates article 14, paragraph 3 (b).

2.5 He complains that he was not allowed to say anything in Court, that he was removed from the courtroom without reason[1] and that he was judged in his absence and without defence counsel. In this context, he states that three lawyers were removed by the judge from the trial, and that his fourth lawyer was not admitted by the judge to the trial. In these circumstances, the author states, he could not call any witnesses nor cross-examine witnesses against him.

2.6 He claims that the Courts in Georgia are not independent, but act in accordance with the orders of President Shevardnadze.

2.7 He claims that in violation of article 19 of the Covenant, he is being victimised for having different political views and for trying to express his views, and for defending the Georgian Constitution which was violated on 22 December 1991 by a change of political power. He denies being guilty of any violent acts.

2.8 As regards the exhaustion of domestic remedies, Mr. Domukovsky states that he appealed to the Chairman of the Supreme Court, to the judge who was in charge of his trial, to the Chairman of the State Commission on Human Rights, to the Minister of Internal Affairs and to the Chairman of the KGB, all to no avail. The judge allegedly told him that, since his trial was not a normal one, the law could not be followed. It is stated that no appeal from the judgement of the Supreme Court is possible.

3.1 The author of the second communication (No. 624/1995), Mr. Tsiklauri is a Georgian national born in 1961 and a physicist by profession. He was arrested on 7 August 1992, while visiting his brother who was a deputy of the Supreme Council and Prefect of the Kazbegi Region before the military coup of 1991-1992. He claims that he was arrested without a warrant. A year later he was shown a warrant, charging him with preparing a coup in July 1992, possession of fire arms and explosives, high treason and obstructing investigation. He denies these charges, which he claims fall under the State amnesty of 4 August 1992. He explains that the charges originate in the struggle of the supporters of President Gamsakhurdia against the regime which took power in December 1991 - January 1992, and did not become lawful before the 1992 October elections.

3.2 Mr. Tsiklauri claims that he was put under continuous psychological and physical pressure in order to find out his contacts with the former President, Zviad Gamsakhurdia. As a result of the treatment, he sustained severe injuries, a head concussion, loss of speech and motion, broken legs, broken ribs, open bleeding wounds, and burns caused by boiling water. He claims that as a result of the tortures, he signed an admission of guilt. He substantiates his allegations by enclosing several statements of witnesses testifying to the results of the tortures.

3.3 He claims that the trial against him and his co-accused was totally unfair and violated almost all articles of the Georgian Criminal Code. More precisely, he states that he was not given a copy of the indictment, nor of the other documents relating to the charges against him. He further states that he was refused a lawyer of his choice to represent him at the hearing, that he was not allowed to call witnesses for his defence, that he was banned from attending the trial, and that as a result he could not cross examine witnesses against him and not present a defence. On 6 March 1995 he was convicted and sentenced to 5 years' imprisonment.

4.1 The author of communication No. 626/1995 Mr. Gelbakhiani is a professor of medicine. A Georgian national, he was born in Tiblisi in 1962.

4.2 Mr. Gelbakhiani states that on 6 January 1992, the President of Georgia, elected by 87% of the population, was overthrown by a military coup, in violation of article 25 of the Covenant. Since then, the opposition has been severely repressed. Mr. Gelbakhiani claims that he was persecuted for his political views, in particular during meetings and rallies, in violation of article 19 of the Covenant, and that a meeting of doctors, of which he was the chairman, was dispersed on 7 May 1992, in violation of article 21. In these conditions, he chose to leave the country. In this context, he also invokes article 12 (2) of the Covenant.

4.3 He states that he had permission from the President of Azerbaijan and from the Minister of Internal Affairs to live in Baku, capital of Azerbaijan. On 6 April 1993, 30 well-armed men kidnapped him and Mr. Domukovsky, and took them to Tbilisi, where they were physically and morally tortured, in order to extort evidence from them. He states that he spent 2 months in the detention ward, where prisoners can only be kept for 3 days.

4.4 While the case was before the Supreme Court, Mr. Shevardnadze, allegedly expressed himself in newspapers and on TV, ignoring the presumption of innocence, calling the defendants "killers" and "demanding death sentence", in violation of article 14 (2) of the Covenant.

4.5 The author also claims that there have been gross violations of the judicial code, in that only certain people were allowed to attend the trial. These people figured on a special list signed by the judge. This is said to constitute a violation of article 14 (1) of the Covenant.

4.6 Mr. Gelbakhiani claims that he was denied a fair trial. Several of his co-defendants did not have lawyers and were not authorised to study the case in their native language, thus hindering their defence. The author states that he did not have the possibility of studying the trial documents beforehand. Moreover, the judge assigned a lawyer for his defence; whom he had already refused.

4.7 The trial before the Supreme Court was stopped several times without objective reasons and lasted from 5 October 1993 until 6 March 1995.

4.8 At one stage he was banned from the courtroom and was subsequently tried in his absence. The main witnesses were not questioned in court and he was only confronted with very few witnesses. He claims that during the whole interrogation, moral and physical pressure were brought to bear on him in order to make him plead guilty and "confess".

4.9 On 6 March 1995, he was sentenced to death. He claims that his death sentence is in violation of article 15 of the Covenant, since the constitution in force at the time of the incident of which he was convicted prohibited the imposition of capital punishment.

5.1 The author of communication No. 627/1995, Mr. Dokvadze, is a Georgian citizen born in Tiblisi in 1961.

5.2 Mr. Dokvadze states that he was arrested on 3 September 1992 and that he was severely tortured, in violation of article 7 of the Covenant. During the investigation a confession was extorted from him, under the threat that his two small daughters would be killed. The author states that he withdrew this confession at the trial.

5.3 Like some of his co-defendants, Mr. Dokvadze was removed from the courtroom and was subsequently absent from the proceedings. He claims that, like his co-defendants, he was denied a fair trial by an impartial and competent tribunal.

5.4 On 6 March 1995 he was sentenced to death.

The complaint

6. The authors contend that both their arrest and their detention were arbitrary and contrary to various provisions of article 9 of the Covenant. They complain of having been subjected to torture and ill-treatment, in violation of articles 7 and 10 of the Covenant. They further claim that the State party violated articles 19, 21 and 25 in their respect, because they were prevented from political activity and persecuted for their political ideas. As for the criminal proceedings against them, they contend that the trial was not impartial and that the presumption of innocence and the guarantees of a fair proceeding were violated. As to the two sentences of death, they allegedly entail a violation of the principle nulla poena sine lege in contravention of article 15 of the Covenant, and consequently also of article 6 of the Covenant.

The State party's information and authors' comments

7.1 The communications of Messrs Domukovsky and Tsiklauri were transmitted to the State party under rule 91 of the rules of procedure on 2 March 1995, requesting the State party to submit observations on the admissibility of the communications. At the same time the Committee requested the State party under rule 86 to stay the execution of any death sentence until the Committee had had an opportunity to examine the cases. The communications of Messrs Gelbekhiani and Dokvadze were transmitted under rules 86 and 91 of the rules of procedure on 10 March 1995.

7.2 Although the State party had been requested to submit its observations on admissibility, it only submitted, on 10 March 1996, information to the effect that on 6 March 1996 seventeen defendants in the criminal case No. 7493010 had received various sentences, including two who had been sentenced to death, Petre Gelbakhiani and Irakli Dokvadze. A list of convicted persons and sentences was included. With regard to death sentences in general, the State party indicated that these may be appealed to the Supreme Court, and that the execution of death sentences is deferred until the matter of pardon is examined by the Pardon Commission.

7.3 By letter of 23 March 1995 Mr. Tsiklauri informed the Committee that he was sentenced to 5 years of imprisonment in a colony of intensive regime and that his property had been confiscated. He alleged that he was tortured, that he is innocent, that the presumption of innocence was violated repeatedly during the trial, that he was not present at the trial, except on the last day to listen to the verdict, that he was denied the right to have a lawyer of his own choice, that he was unable to testify on his own behalf, that he was denied the right to interrogate witnesses. Mr. Tsiklauri's submission together with accompanying documents in substantiation of his allegations were forwarded to the State party on 11 May 1995, but no observations from the State party were received in spite of a reminder sent on 30 October 1995.

7.4 By letters of 17 March 1995 Dr. Petre Gelbakhiani and Irakli Dokvadze reiterated their innocence and sought the Committee's intercession. The submissions were transmitted to the State party on 16 May 1995. No reply was received from the State party.

The Committee's decision on admissibility

8.1 At its 57th session, the Committee examined the admissibility of the communication. It ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

8.2 The Committee noted with concern the absence of cooperation from the State party, in spite of the reminders that were addressed to it. On the basis of the information before it, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b) of the Optional Protocol.

8.3. On the basis of the submissions before it, the Committee observed that the authors had sufficiently substantiated, for purposes of admissibility, their allegations of violations of the Covenant by the State party, in particular, of articles 7, 9, 10, 14, 15, 19, 21 and 25, which should be examined on the merits.

9. On 5 July 1996, the Human Rights Committee therefore decided that the communication was admissible. It requested the State party, under rule 86 of

the rules of procedure, not to carry out the death sentence against Messrs. Dokvadze and Gelbakhiani while their communication was under consideration by the Committee.

State party's submission concerning the merits of the communication and the authors' comments

10.1 By submission of 21 February 1997, the State party provides observations concerning the merits of the communication.

The case of Mr. Viktor P. Domukovsky

10.2 With regard to Mr. Domukovsky, the State party explains that he was sentenced to fourteen years' imprisonment, for banditry, preparation of terrorist acts and diversionary acts for the purpose of weakening the Republic of Georgia.

10.3 The State party submits that Mr. Domukovsky and Mr. Gelbakhiani were legally detained in Azerbaijan by virtue of an agreement between the relevant Georgian and Azerbaijan ministries, which provides for the tracing and detention of suspects who go into hiding in either State. They were detained, on 6 April 1993, on the basis of an arrest warrant, issued by the Government prosecutor on 30 September 1992.

10.4 The State party denies that Mr. Domukovsky enjoyed parliamentary immunity at the time of his arrest. It explains that a newly elected Parliament was in office at the time he was detained, and as a member of the former Supreme Soviet he no longer enjoyed immunity.

10.5 The State party submits that Mr. Domukovsky's claims of physical violence and mental duress during the preliminary investigation were not substantiated in judicial examination. The Court came to its conclusion because neither the accused nor his counsel - in whose presence he was interrogated - made any mention of such violence. Moreover, the case files assembled by the investigation team also contained records in which Mr. Domukovsky denied responsibility for a number of incidents. The Court concluded that this would not have occurred if the investigation had been conducted unfairly.

10.6 Concerning the incident of 13 August 1995, the State party submits that, upon a statement from Mr. Domukovsky to the court on 15 August, the medical service at the remand block was instructed to examine him. He was examined on 17 August. According to the record of the examination, his body bore no more marks of injury and his health was found to be satisfactory. It was not substantiated that he had been beaten.

10.7 With regard to the failure of the Court to provide Mr. Domukovsky with an indictment in Russian, the State party explains that the court established that Mr. Domukovsky had a perfect command of Georgian. In this context, it is submitted that he gave evidence in Georgian during the preliminary investigations and did not ask for an interpreter. According to the State party, Mr. Domukovsky read over the depositions in Georgian and signed them as accurate, drew up his own statements in Georgian and stated in the records that Georgian was his native language. In the light of the above, the Court considered his demand for an indictment in Russian to be a delaying tactic.

10.8 The State party submits that after the preliminary investigation, Mr.

Domukovsky and his counsel went over all the material assembled. In none of their applications they asked to be granted access to additional material nor claimed that they had not been provided with all the material. Before the beginning of the trial, Mr. Domukovsky requested an opportunity to go over the files once more. This request was granted by the court. It is submitted that Mr. Domukovsky studied the files from 13 October 1993 to 6 January 1994.

10.9 The State party submits that Mr. Domukovsky and his co-accused had an unrestricted right to defence throughout the preliminary investigation and the judicial enquiry. They were afforded the opportunity to select their own counsel. For this purpose, the court summoned members of the defendants' families and gave them an opportunity to meet with the defendants repeatedly in order to decide on the lawyers which they wanted to call in.

10.10 The State party submits that one of the objectives of the defendants was to delay the consideration of the case and to disrupt the procedures of the court. It explains that, after Domukovsky's counsel had withdrawn from the case, he and his family were allowed the time prescribed by law to find a new lawyer. Since they had not appointed anyone once the time expired, the Court appointed a lawyer, who was given a month and a half to acquaint himself with the case. During this period proceedings were suspended. When the trial resumed, Domukovsky rejected this lawyer, according to the State party without valid grounds, and threatened him. The counsel then withdrew, after which the court decided that he had abused his right to defence and the case was concluded without counsel for Domukovsky in attendance.

10.11 The State party explains that Mr. Domukovsky and other of the accused regularly disrupted the proceedings during the judicial hearings, showing disrespect to the court, ignoring the instructions from the chairman and preventing the court to go about its normal work. The State party submits that they turned their backs to the court, resisted the military guards, fled from the courtroom to the cells and whistled. On one occasion, Mr. Domukovsky leapt over the bar into the courtroom and grabbed a guard's automatic weapon. The State party concludes that this was sufficient reason for the Court to continue the examination of the case in the absence of the defendants as permitted under article 262 of the Georgian Code of Criminal Procedure. The State party points out that the court allowed the defendants back in after a period of time, but they continued disrupting the procedures, following which they were again removed.

10.12 The State party rejects the suggestion by Mr. Domukovsky that the courts in Georgia are not independent and states that they are subordinate to the law alone. It further rejects his claim that he was convicted for his political opinions and emphasizes that he was convicted for having committed criminal offences.

10.13 The State party explains that serious criminal cases, in which the death penalty can be imposed, are under Georgian legislation judged by the Supreme Court. The sentences pronounced by the Supreme Court are not subject to appeal by cassation, but the law provides for a judicial review. Upon review, the conviction and sentence of Mr. Domukovsky and his codefendants was found to be lawful and legitimate.

11.1 In his comments on the State party's submission, counsel for Mr. Domukovsky states that he requested the Ministry of Internal Affairs in Azerbaijan whether they had any trace of an authorisation for the arrest and detention of Mr. Domukovsky and Mr. Gelbakhiani. He joins the reply from the

Ministry, dated 7 July 1995, in which the chief of the department of criminal prosecution states that he does not know about the case. Counsel argues that if it were true that Mr. Domukovsky and Mr. Gelbakhiani were arrested on the basis of a bilateral agreement between Azerbaijan and Georgia, it would be logical that the Azerbaijan ministry would have records of such an undertaking. In the absence of such record, counsel argues that Mr. Domukovsky and Mr. Gelbakhiani were arrested in violation of article 9 of the Covenant.

11.2 Counsel maintains that Mr. Domukovsky's arrest was in violation of his parliamentary immunity. He denies that the elections of 11 October 1992 were free and democratic. He further states that, even if the elections were accepted as lawful, the arrest warrant against Mr. Domukovsky was issued before the elections took place, on 30 September 1992, and that in those circumstances it was unlawful to issue the warrant without the agreement of the Supreme Soviet to lift his immunity. Counsel argues that Mr. Domukovsky's arrest was thus in violation of article 25 of the Covenant.

11.3 With regard to the beatings and psychological pressure to which Mr. Domukovsky and other accused were subjected, counsel argues that it was not possible to make any written statements, because it would not have been allowed, because these statements would have to be addressed to officials involved in the beatings, and because the accused were worried about their families and tried to protect them by keeping silent. Counsel maintains that Mr. Domukovsky was kept in preventive detention from 7 April to 28 May 1993, whereas such detention is only lawful for three days. He was kept in complete isolation and could not see his lawyer. Only after he began a hunger strike on 25 May, was he transferred to a detention block, on 28 May 1993, in a KGB prison. He was put under constant psychological and physical pressure and they threatened to detain his family. He finally consented to plead guilty in the Kvareli case, if they would prove to him that his family was alive and well. Counsel further submits that it is an old trick to make the accused deny certain charges to make the records of interrogation more believable.

11.4 With regard to the incident of 13 August 1995, counsel submits that many of those present in court on 15 August had seen that Mr. Domukovsky had been beaten. According to counsel, a journalist made a video, but a day later he said that he didn't have it. Counsel further states that the judge was initially unwilling to order a medical examination and that it was thanks to Mr. Domukovsky's wife, who at that time acted as his legal counsel, that a medical examination was finally held on 15 August 1995. According to counsel, the examination showed haematomas on the elbow and right shoulder and apparently he should have been prescribed bed rest for ten days because of a concussion. According to counsel, however, the latter was not mentioned in the medical report.

11.5 Counsel points out that the State party did not address the second incident of 11 December 1994. Counsel refers to an incident (date of which unclear) when the judge spoke to the doctors before and after they examined Mr. Domukovsky, and when they took a cardiogram, apparently with the left electrode not well attached. According to counsel they found rests of the symptoms of the disease of Babinski. Counsel reiterates that the accused had no way of protesting but that they tried nevertheless.

11.6 Counsel states that he is in possession of certificates which attest that Mr. Domukovsky finished his studies at the university of Tbilisi in Russian, and that he conducted research at the Science Academy of Georgia, also in Russian. He points out that in the records of the interrogation of 12 April 1993, it is stated that it was explained to him that he had the right to testify in his mother tongue and to have the services of an interpreter. He was then made to sign a statement in which he said that he spoke the Georgian language well, and that he needed an interpreter. According to counsel, the interrogators were so happy that he had filled out that he spoke the language well, that they overlooked that he had failed to put down the word 'not' with regard to the need for an interpreter. In this context, counsel also points out that Mr. Domukovsky always tried to sign in both Georgian and Russian, by way of protest. Counsel states that his lawyer at the preliminary investigations was Georgian of origin and thus had no problem reading the file.

11.7 With regard to the access to the files, counsel explains that in the beginning it was not clear to Domukovsky that he would be judged with 18 others, and moreover, the trial in the Kvareli case was not yet over. Counsel explains that Domukovsky was also charged in the Kvareli case, and that in that case all accused had disavowed their statements made during the preliminary hearings. According to counsel, the accused' statements made in public session of the court, were not made available to Domukovsky nor to his lawyer. Counsel confirms that Mr. Domukovsky had knowledge of the files as from 13 October, but states that he went on hunger strike between 18 and 25 November in order to get access to the main case.

11.8 Concerning the access to his legal representatives, counsel states that this right was severely limited, while he was held first in preventive detention and then in the KGB prison, and that during that period his counsel could not visit him without the procurator being present.

11.9 Counsel denies that Mr. Domukovsky has disrupted the trial proceedings, but states that he participated in passive protest by turning his back to the judge. Counsel submits that there was no other way to show his disagreement with the trial, since no statement had been accepted by the judge. Counsel explains that when Mr. Domukovsky jumped over the barrier, he had been provoked by the vulgar words of the judge. Besides, he was not removed at that time. Counsel states that the judge did not let the accused return to the court room out of his free will, but that he was forced to do so by a hunger strike of 64 days, from 13 January to 17 March 1994. Counsel states that Mr. Domukovsky still suffers from health consequences of the hunger strike.

11.10 On 13 September 1994, Mr. Domukovsky was once more excluded from the trial, when he questioned the removal of his lawyer. In this context, counsel explains that the judge was influenced by the political situation in the country, and that he delayed the trial in the beginning for political reasons. According to counsel, it could never be in the interests of the accused to delay the trial.

11.11 It is stated that, for reasons independent of him, Mr. Domukovsky found himself without lawyer on 6 June 1994. He was given ten days to find himself a new lawyer, but after eight days already the judge assigned a lawyer to him. When he asked whether Domukovsky approved, he said that he could not say since he didn't know him. Counsel denies the affirmation of the State party that Domukovsky agreed to the appointment of this lawyer. It is stated that the lawyer visited Domukovsky only twice, and that on both occasions he was drunk. On 15 August, Mr. Domukovsky then informed the judge that he could not approve of him as his lawyer if he would not visit him more often to get acquainted with the case. The lawyer not having visited him, Mr. Domukovsky then withdrew his approval. Counsel states that Mr. Domkukovsky's wife was unlawfully removed as his legal representative by the judge on 12 September 1994, because she demanded a medical examination. On 13 September 1994, Mr. Domukovsky was excluded from attending the hearing. On 19 September, Domukovsky appointed a new counsel, who had followed the trial from the beginning as representative of one of the other accused. However, the judge refused to accept his appointment and on 24 September 1994 decided that Domukovsky would stay without a defense lawyer.

11.12 Counsel maintains that president Shevarnadze has influenced the courts in a newspaper interview on 29 November, in which he said that the accused had committed acts of terrorism. Moreover, it is stated that the judge had ordered to make lists of everyone who attended the trial. The political character of the trial is also borne out, according to counsel, by the judgement in the case, where it is said that the representatives of the old power and enemies of the present power organised armed troops to commit crimes against the State. Counsel maintains that there was not enough evidence to convict Domukovsky for banditry.

11.13 Concerning the judicial review, counsel seems to suggest that Mr. Domukovsky still has not received a reply on his request for review by the Supreme Court.

The case of Mr. Zaza S. Tsiklauri

12.1 The State party explains that Mr. Tsiklauri was convicted of illegally carrying fire arms and storing explosives. He was sentenced to five years' imprisonment.

12.2 The State party submits that a warrant for Tsiklauri's arrest was issued on 1 August 1993, and he was arrested on 7 August 1993. According to the State party, he was not covered by the declaration of amnesty of the State Council, since that only applied to those involved in the assault on and occupation of the Georgian Radio and Television building in Tbilisi on 24 June 1992.

12.3 The State party submits that the court did not accept Tsiklauri's claim that he had been subjected to physical and mental duress during the preliminary investigation, since neither Tsiklauri nor his lawyer had mentioned this during the investigations. The interrogations were conducted in the presence of a lawyer and Tsiklauri wrote his confessions in his own hand and signed the records of the interrogations as adequate. Furthermore, the State party submits that during his detention Tsiklauri was visited by representatives of international organizations, to whom he did not affirm that he had been put under any kind of pressure. Moreover, the Prosecutor instituted criminal proceedings in connection with Tsiklauri's injuries and a full inquiry was held, but the case had to be dropped for lack of evidence. According to the State party, it was established that he had leaped from a vehicle that had transported him.

12.4 The State party submits that Mr. Tsiklauri was given a copy of the indictment in accordance with the law. Once the preliminary investigation was over, Tsiklauri and the other accused, together with their lawyers went over the files. The State party notes that the applications submitted did not mention the need to consult additional material. Before the trial, Tsiklauri requested to consult the case files, and the court agreed and made files and records such as were available at the time accessible from 13 October 1993 to 6 January 1994. Trial proceedings were suspended for this period.

12.5 The State party maintains that Tsiklauri enjoyed an unrestricted right to defence throughout the preliminary investigation and the judicial enquiry. He was afforded the opportunity to select his own counsel. Mr. Tsiklauri chose to be defended by T. Nizharadze, from 21 September 1992 onwards. On 6 January 1994, he requested that his wife, N. Natsvlishvili, be admitted as additional defence counsel and be allowed to consult the case files. The court, considering this a deliberate attempt to delay the trial, denied the application and the trial continued with Nizharadze as defence counsel.

12.6 With regard to Tsiklauri's claim that the trial was held in his absence, the State party refers to its explanations in the case of Mr. Domukovsky (see para. 10.11)

13.1 In his comments on the State party's submission, Mr. Tsiklauri states that on 7 August 1992, he was taken from his mother's flat to the KGB for 'conversation'. His family was not informed of his whereabouts. On 17 August 1992, the head of the KGB, Mr. Batiashvili, appeared on national television and announced his resignation, because of the maltreatment of Tsiklauri.

13.2 Mr. Tsiklauri maintains that he saw his arrest warrant only a year after his arrest when the preliminary investigation was coming to an end and he was handed the materials of his case. He claims that the information in the warrant, which was dated 1 August 1992, such as date of birth, address and marital status, did not coincide with the real state of affairs. He further states that the warrant was for actively participating in preparation of the military coup of 24 June 1992, and for keeping weapons and explosive materials. He states that, according to the material in the case file, the official charges against him date from 20 August 1992, and do not correspond to those mentioned in the warrant.

13.3 He maintains that the crimes he was charged with, of which he denies any knowledge, were covered by the amnesty of 3 August 1992, which read, according to him:" ...#10. Proceeding from the supreme interests of unity and concord, persons who have taken part in the actions against the authorities of the Georgian republic since January 6 of the current year shall be freed from criminal charges as long as they have not committed serious crimes against peaceful population... #12. The participants of the adventurist coup attempt on 24 July 1992 shall be exempted from criminal charges committed by them against the country and people." Mr. Tsiklauri thus confirms that the charges against him were covered by the amnesty.

13.4 Mr. Tsiklauri denies that his injuries were caused by falling out of a car. He states that the investigation into the cause of the injuries was done by the same people who were investigating the criminal charges against him. He denies that he ever tried to escape by jumping off a car, and states that it is a lie that he burned a third of his body by dropping hot tea he was drinking. He further states that this could easily have been established if there would have been a court hearing into his case.

13.5 Mr. Tsiklauri further states that, with exception of the confessions as a result of torture, all testimonies given during the presence of his lawyer deny guilt of the charges. He states that the court never bothered to check whether the testimonies in the preliminary investigation were indeed given by him. He further explains that, because he was not allowed to be present during the court hearings, he was unable to give testimony, interrogate witnesses and present the proofs of his innocence.

13.6 He further challenges the State party's remark that he has never told representatives of international organizations that he was subjected to torture. He states that he made statements in court, and also to Human Rights Watch/Helsinki and British Helsinki Human Rights Group. He further refers to a report on torture in Georgia and Batiashvili's statement on national television of 17 August 1992, plus a newspaper article of 27 August 1992 and an interview with the British Human Rights Helsinki Group. Mr. Tsiklauri also refers to his statement to the medical expert on 18 August 1992, which is apparently reflected in the case file, that he was severely beaten by unknown people on 7 August 1992. He further refers to a letter from the KGB to the Prosecutor's Office, in which the KGB states that the statement made by Batiashvili on August 17 was based on a meeting that same day with Tsiklauri in the preliminary detention cell when Tsiklauri claimed that he had been beaten and then tortured by unknown people with boiling water. He also refers to testimonies given during the court hearings by Gedevan Gelbakhiani, Gela Mechedilishvili and Gia Khakhviashvili, all attesting to the fact that he was tortured.

13.7 Mr. Tsiklauri states that after the appearance of the KGB boss on television, a Special Commission was formed to investigate. He states that his state of health was serious, that he had multiple bone fractures, and that he had partially lost speech. He adds that he was not transferred to the prison hospital until he had signed false testimonies. Afterwards, during one of the regular interrogations in presence of his lawyer, he denied the statements that he had given under torture.

13.8 Mr. Tsiklauri maintains that he did not have access to all the materials in the case.

13.9 Mr. Tsiklauri states that he was left without a defence at the beginning of his detention, and that only in October 1992, he managed to hire a lawyer. On 22 March 1994, he requested the court to allow his wife, Nino Natvlishvili, to become his legal representative at the hearing. This was rejected by the court, because she would need additional time to get acquainted with the materials of the case which would delay the trial. When Tsiklauri said that no additional time was needed, the Court still refused to accede to his demand. On 4 April 1994, the lawyer Nizharadze, who was told by the court to continue the defence of Mr. Tsiklauri, put a motion asking to be released from his duty to defend Tsiklauri, since the agreement between him and the defendant had been annulled. The Court refused, according to the author in violation of the law, and the lawyer told the court that he could not defend him against his will. Then the judge wrote to the Bar Society, informing them that he had refused the order of the court to take up the defence of Tsiklauri. He was subsequently expelled from the Bar, with the consequence that he can no longer practice as a lawyer. On 8 July 1994, the court appointed a new lawyer, Mr. G. Kapanadze, whom was given until 29 July to study the files. Although not refusing the assignment, the lawyer publicly spoke about the lack of trust of Tsiklauri in him, and that by consequence, he was in fact left without defense. He made it clear that he was not refusing out of fear to be dismissed. On 9 February 1995, the lawyer stated in court that the accused did not want him as his lawyer, that he had no contact with him, and that he had a right to choose his counsel himself and to refuse an advocate even at this stage of the proceedings. He stated that the decision of the court to refuse him the lawyer of his own choice violated his rights.

13.10 In this connection, Mr. Tsiklauri states that it was the Court itself that was delaying the trial, whereas the defendants were demanding a timely trial. According to him, the judge did not consider any of the defendants' lawful demands, created stressful situations and violated the law openly. The judge is alleged to have said that the law was written for normal court hearings, not for abnormal ones. It is alleged that the courts in Georgia are not independent but subordinate to the government. In this context, reference is made to statements by the president of the Supreme Court in Georgia.

13.11 Mr. Tsiklauri states that he never violated any court order during the trial and that there was no reason to send him away. He states that the judge did not want him present because he did not want to satisfy his lawful demands. He states that the incident when they all turned their backs to the judge happened when the judge had decided to send one of the defendants out of the court room, since he had requested special assistance because he was suffering from impaired hearing caused by torture. All the defendants were then removed by the judge. After three months they were again allowed to follow the hearing in court, but the judge continued to deny lawful requests from the defendants. Mr. Tsiklauri states that he was then removed from court for a 'cynical smile'. He was not allowed back in, and therefore had no opportunity to defend himself.

The case of Mr. Petre G. Gelbakhiani

14.1 The State party submits that Mr. Gelbakhiani was convicted of banditry, preparation of terrorist acts, preparation of diversionary acts for the purpose of weakening the Republic of Georgia, and of the wilful murder of several individuals and of attempted murder in aggravating circumstances. He was sentenced to death. On 25 July 1997, his sentence was commuted to 20 years' imprisonment.

14.2 The State party rejects Mr. Gelbakhiani's claim that he was convicted for his political opinions and emphasizes that he was convicted for having committed criminal offences.

14.3 The State party reiterates that Mr. Gelbakhiani and Mr. Domukovsky were arrested in Azerbaijan by virtue of an agreement between Georgia and Azerbaijan. A warrant for the arrest of Mr. Gelbakhiani was issued by the Government Prosecutor on 30 September 1992. He was arrested on 6 April 1993.

14.4 That Mr. Gelbakhiani was subjected to mental and physical duress during the preliminary investigation was not substantiated according to the State party.

14.5 As the review procedure, it was established that no breaches of procedure had occurred during the preliminary investigation or judicial inquiry.

14.6 The State party explains that the trial took place in public and that entry to the court room and attendance was restricted only when there was not enough room for all who wished to be present.

14.7 The State party maintains that Mr. Gelbakhiani was given a copy of the charges against him, in full compliance with the law. Once the preliminary investigation was over, he and the other accused, together with their lawyers went over the files. The State party notes that the applications submitted did not mention the need to consult additional material. Before the trial, Gelbakhiani requested to consult the case files, and the court agreed and made files and records such as were available at the time accessible from 13 October 1993 to 6 January 1994. Trial proceedings were suspended for this period.

14.8 The State party maintains that Mr. Gelbakhiani enjoyed an unrestricted right to defence throughout the preliminary investigation and the judicial enquiry. He was afforded the opportunity to select his own counsel. For this purpose, the court gave him an opportunity to meet with members of his family in order to decide on the lawyers which he wanted to call in. Mr. Gelbakhiani chose to be defended by I. Konstantinidi, from 24 September 1993 onwards. This lawyer had also defended him during the preliminary investigations. On 16 February 1994, Konstantinidi applied to the court to be released from the case, but the court refused, considering that the application was an attempt to delay proceedings.

14.9 In this context, the State party points out that the trial lasted a year and five months, but that only during six months, the court was considering the case. The rest of the time, consideration was delayed because of the unwarranted applications from the defendants.

14.10 With regard to Gelbakhiani's claim that the trial was held in his absence, the State party refers to its explanations in the case of Mr. Domukovsky (see para. 10.11)

14.11 Concerning the legitimacy of the death sentence, the State party explains that the Declaration of the Supreme Soviet of the Republic of Georgia of 21 February 1992 recognized the supremacy of the Constitution of Democratic Georgia of 21 February 1921 and laid down the procedure for its application with due regard for present-day conditions. In accordance with the first paragraph of the Order adopted by the State Council on 24 February 1992, the legislation existing at that time was to apply in the Republic of Georgia until current legislation had been brought into line with the principles of the Georgian constitution. Moreover, on 11 June 1992, the State Council passed an order, explaining that the existing legislation, including the system of punishments laid down in the criminal Code - which provides for the death penalty - was in effect in the territory of the Republic of Georgia. The State party argues therefore that Gelbakhiani's claim that the death sentence passed on him violated the constitution in force at the time is unfounded.

15.1 In his comments, Mr. Gelbakhiani explains that he left Georgia because of his political opinions, and that he received permission to live in Azerbaijan. On 6 April 1993, thirty armed persons surrounded his house and kidnapped him and Mr. Domukovsky. He states that no arrest warrant was produced and that he was moved to Georgia illegally.

15.2 He maintains that he was beaten upon his arrest and that he still has scars on his face. During interrogation, he was put under psychological pressure, and the interrogators threatened the members of his family. He states that he was kept in the detention ward for two months, whereas according to the law the maximum time in such detention is three days.

15.3 He states that the principles of due process were violated during his trial, and that ordinary citizens were not allowed to attend the trial. He further states that the presumption of innocence was violated, since the president of the Republic called the accused killers and demanded the death penalty.

15.4 He further reiterates that he was denied access to the documents in the so-called Kvareli case, which initially was to be tried together with his case, but had been separated from it.

15.5 On 28 January 1994, Mr. Gelbakhiani decided to abolish the agreement with his lawyer, because of the disturbed working relations with the court. The agreement was abolished on 28 January 1994. However, the Court did not accede to the request, and on 16 February 1994, appointed the same lawyer again. When the lawyer protested, the Bar Association confirmed the court's decision, on 21 February 1994. Mr. Gelbakhiani argues that, since he was defended by a lawyer whom he had dismissed before, he had been denied free choice of counsel and was in fact left without a lawyer.

15.6 According to Mr. Gelbakhiani, on 25 February 1992 the 1921 Constitution was restored, according to which the death penalty was abolished. This remained the legal situation until 17 June 1992. Since the incident of which he was convicted took place on 14 June 1992, the death penalty cannot legally be applied to his case.

The case of Mr. Irakli Dokvadze

16.1 The State party explains that Mr. Dokvadze was convicted of banditry, preparation of terrorist acts, preparation of diversionary acts for the purpose of weakening the Republic of Georgia, and of the wilful murder of several individuals and of attempted murder in aggravating circumstances. He was sentenced to death. On 25 July 1997, his sentence was commuted to 20 years' imprisonment.

16.2 The State party submits that Mr. Dokvadze's claim that he had given evidence under physical and mental duress was not substantiated during the judicial examination of the case. The State party explains that throughout the preliminary investigation, Mr. Dokvadze made no mention of torture or psychological pressure being inflicted on him although he repeatedly had meetings alone with his lawyer and thus had the opportunity to appeal to the authorities or to the international human rights organizations whose representatives he also met. The State party submits that on 8 September 1992, he was interviewed on television and acknowledged his crimes. Further, during the preliminary investigation he was interrogated in the presence of a lawyer and he wrote out his confessions himself, read the reports of the interrogations, added comments and signed the testimony given as accurate. On this basis, the court found that the claim that violence had been used against him, was not borne out by the facts.

16.3 With regard to the claim that the trial was held in his absence, the State party refers to its explanations in the case of Mr. Domukovsky (see para. 10.11).

17. No comments have been received from Mr. Dokvadze, despite a reminder sent on 20 November 1997.

Issues and proceedings before the Committee

18.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

18.2 With regard to the claim made by Mr. Domukovsky and Mr. Gelbakhiani that they were illegally arrested when residing in Azerbaijan, the Committee notes that the State party has submitted that they were arrested following an agreement with the Azerbaijan authorities on cooperation in criminal matters. The State party has provided no specific information about the agreement, nor has it explained how the agreement was applied to the instant case. Counsel for Mr. Domukovsky, however, has produced a letter from the Azerbaijan Ministry of Internal Affairs to the effect that it was not aware of any request for their arrest. In the absence of a more specific explanation from the State party of the legal basis of their arrest in Azerbaijan, the Committee considers that due weight should be given to the authors' detailed allegations and finds that their arrest was unlawful in violation of article 9, paragraph 1, of the Covenant.

18.3 In the circumstances, the Committee need not address the question whether Mr. Domukovsky's arrest was also illegal because of his claimed parliamentary immunity or that it violated article 25 of the Covenant.

18.4 Mr. Tsiklauri has claimed that he was arrested illegally in August 1992 without a warrant and that he was not shown a warrant for his arrest until after he had been in detention for a year. The State party has denied this allegation, stating that he was arrested in August 1993, but it does not address the claim in detail or provide any records. In the absence of information provided by the State party as to when the arrest warrant was presented to Mr. Tsiklauri and when he was first formally charged, and in the absence of an answer to the author's claim that he had been in custody for one year before the warrant was issued, the Committee considers that due weight must be given to the author's allegation. Consequently, the Committee finds that article 9, paragraph 2, has been violated in Mr. Tsiklauri's case.

18.5 With respect to Mr. Tsiklauri's claim that the charges against him were covered by the amnesty decree of 3 August 1992, the Committee considers that the information before it does not enable it to make any conclusions in this respect and finds that the author's claim has not been substantiated.

18.6 Each of the authors have claimed that they have been subjected to torture and ill-treatment, including severe beatings and physical and moral pressure, which in the case of Domukovsky, caused concussion, in the case of Tsiklauri, caused concussion, broken bones, wounding and burning, in the case of Gelbekhiani caused scarring, and in the case of Dokvadze, involved both torture and threats to his family. The State party has denied that torture has taken place, and stated that the judicial examination found that the claims were unsubstantiated. It has, however, not indicated how the court has investigated the allegations, nor has it provided copies of the medical reports in this respect. In particular, with regard to the claim made by Mr. Tsiklauri, the State party has failed to address the allegation, simply referring to an investigation which allegedly showed that he had jumped from a moving vehicle and that he had spilled hot tea over himself. No copy of the investigation report has been handed to the Committee, and Mr. Tsiklauri has contested the outcome of the investigation, which according to him was conducted by police officers without a court hearing ever having been held. In the circumstances, the Committee considers that the facts before it show that the authors were subjected to torture and to cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.

18.7 The Committee has taken note of Mr. Domukovsky's claim that he did not receive a copy of the indictment in Russian and that he was denied the services of an interpreter, whereas he is Russian of nationality, not Georgian. The State party has submitted that the court found that the author's knowledge of the Georgian language was excellent. Moreover, the author is said to have given his statements in Georgian. The author's counsel has submitted that he did his studies and research in Russian, but has not shown that he did not have sufficient knowledge of Georgian. In the circumstances, the Committee finds that the information before it does not show that Mr. Domukovsky's right under article 14, paragraph 3(f), to have the free assistance of an interpreter if he cannot speak or understand the language used in court, has been violated.

18.8 With regard to the question whether the authors had access to all the materials in the trial against them, the Committee notes that the information before it is inconclusive. The Committee finds that the authors' claim has not been substantiated.

18.9 The Committee notes that it is uncontested that the authors were forced to be absent during long periods of the trial, and that Mr. Domukovsky was unrepresented for part of the trial, whereas both Mr. Tsiklauri and Mr. Gelbakhiani were represented by lawyers whose services they had refused, and were not allowed to conduct their own defence or to be represented by lawyers of their choice. The Committee affirms that at a trial in which the death penalty can be imposed, which was the situation for each author, the right to a defence is inalienable and should be adhered to at every instance and without exception. This entails the right to be tried in one's presence, to be defended by counsel of one's own choosing, and not to be forced to accept ex-officio counsel[3]. In the instant case, the State party has not shown that it took all reasonable measures to ensure the authors' continued presence at the trial, despite their alleged disruptive behaviour. Nor did the State party ensure that each of the authors was at all times defended by a lawyer of his own choosing. Accordingly, the Committee concludes that the facts in the instant case disclose a violation of article 14, paragraph 3(d), in respect of each author.

18.10 Mr. Gelbakhiani has claimed that the death penalty against him and Mr. Dokvadze was unlawful, because the constitution in force at the time when the crimes were committed did not allow the death penalty. The State party has argued that by decree of the State Council this part of the constitution was not applicable and that the death penalty remained in force. The Committee expresses its concern that basic rights, laid down in the Constitution, would have been abrogated by decree of the State Council. However, in view of the lack of precise information before it and in view of the commutation of the death sentence against the authors, the Committee need not consider whether the imposition of the death penalty in the instant case was indeed unlawful for the reasons forwarded by the authors. The Committee recalls, however, that the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant.

18.11 The Committee notes from the information before it that the authors could not appeal their conviction and sentence, but that the law provides only for a judicial review, which apparently takes place without a hearing and is on matters of law only. The Committee is of the opinion that this kind of review falls short of the requirements of article 14, paragraph 5, of the Covenant, for a full evaluation of the evidence and the conduct of the trial and, consequently, that there was a violation of this provision in respect of each author.

18.12 The Committee finds that the authors' claims that they were denied a public trial, that the presumption of innocence was violated in their case, that the courts were not impartial and that they were prosecuted in violation of their right to freedom of opinion and expression and that their freedom of association was violated, have not been substantiated.

19. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, and 14, paragraphs 3 (d) and 5, of the International Covenant on Civil and Political Rights, in respect of each author, and also a violation of article 9, paragraph 1, in respect of Mr. Domukovsky and Mr. Gelbekhiani, and of article 9, paragraph 2, in respect of Mr. Tsiklauri.

20. The Committee is of the view that the authors are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including their release. The State party is under an obligation to ensure that similar violations do not occur in the future.

21. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] From the enclosures, it appears that the author turned his back to the court out of protest against the irregular nature of the proceedings.

[2] As paraphrased by the State party. No copy of the record has been provided.

[3] See Committee's Views in inter alia communications Nos. 52/1979, Sadías de Lopez v. Uruguay, adopted on 29 July 1981, 74/1980, Estrella v. Uruguay, adopted on 29 March 1983. See also 232/1987, Pinto v. Trinidad & Tobago, Views adopted on 20 July 1990.

N. Communication No. 635/1995, E. Morrison v. Jamaica*
(adopted on 27 July 1998, sixty-third session)

Submitted by:	Everton Morrison (represented by Allen & Overy, a London law firm)
Victim:	The author
State party:	Jamaica
Date of communication:	14 June 1995 (initial submission)
Date of admissibility decision:	17 October 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 1998,

Having concluded its consideration of communication No.635/1995 submitted to the Human Rights Committee by Everton Morrison, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Everton Morrison, a Jamaican citizen, currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Mrs. C. Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of two individual opinions by five Committee members is attached.

The facts as submitted by the author

2.1 The author was arrested on 30 December 1988, in connection with the murder, on 26 December 1988, of one Angella Baugh-Dujon in the Parish of St. Andrew, Kingston. On 25 July 1990 at the Home Circuit Court, Kingston, he was convicted and sentenced to death. The author's appeal to the Jamaican Court of Appeal was dismissed on 20 January 1992, and his petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 May 1995. Counsel submits that all domestic remedies have been exhausted for purposes of article 5, paragraph 2(b), of the Optional Protocol.

2.2 The case for the prosecution was that on the evening of 26 December 1988, the author, acting in joint enterprise with a man referred to as "Jacko", shot Angella Baugh-Dujon twice as a result of which she died. Her semi-nude body was found a short distance from her car in the Parish of St. Andrew in Kingston. The prosecution's case was based on circumstantial evidence. There were no eyewitnesses to the incident.

2.3 At trial, the author's girlfriend named Plummer testified that she and the author had a child together, had lived together for five years, and were living together in her parents' house in Gordon Town, Kingston, in December 1988. Plummer testified that at about 5 p.m. on 26 December 1988 she was at home when a friend of the author named "Jacko" arrived, followed at about 6 p.m. by the author. Plummer stated that the two men left together and returned at about 8 p.m., whereupon the author took a black plastic bag from underneath the bed, and the two men left again, returning after about 1 a.m. Plummer stated that when she saw the author, he was wearing only his briefs. She claims that he told her that if anybody asked if he had slept there she must say yes. She stated that she heard the author outside, washing his clothes, although she did not see this. She also stated that "Jacko" was inside the house. Plummer alleged that when she got up at 8 a.m. on the morning of 27 December 1988, both men had left the house, and that she found the brown trousers the author had been wearing the night before in a bucket of water and that they had blood stains on them. She claimed that on the morning of 30 December 1988 both she and the author were at home and were woken up by the sound of police dogs. The author is alleged to have told her to "tell Lloyd Brown to give me one thousand dollars" and "the guns are in the plastic bags on the hill". The author was taken away by the police that morning. Plummer stated that Lloyd Brown was not "Jacko".

2.4 Plummer testified that on 7 January 1989 the police visited her in order to search the house and back garden. In cross-examination she accepted that she had been taken to Constant Spring Police Station on 31 December 1988, that she had given a statement on that date to Mr. Dwyer, and that the same day she was taken to Matilda's Corner Police Station where she was detained for three weeks.

2.5 Another witness, Adolphus Williams, testified that in December 1988 he was living with Plummer's neighbour, and that on the night of 26 December 1988 at about midnight, two men, one of whom he recognized as the author, approached his house. Williams claimed that the author stated that if Williams were to hear anything the next morning he must not tell anyone that he had seen the author, "for is trouble". Williams alleged that the author had something in his hand that was covered by a rag.

2.6 The investigating officer Detective Superintendent Dwyer, testified that the author was brought to his office and questioned about the murder on

6 January 1989, and that following a caution the author admitted to being at the scene of the murder. He implicated "Jacko", told Dwyer that he had the guns used in the crime, and told Dwyer to ask Plummer, as she knew where they were. Dwyer stated that on 7 January 1989 he and other officers went to Plummer's house, and that she directed them to a place in the back yard, where Dwyer seized a black plastic bag containing two firearms.

2.7 Other prosecution evidence included the testimony of Assistant Commissioner Wray, who stated that on the basis of tests conducted on the firearms recovered from the author's garden, both "could have been fired on the 27 day" of December 1988, and that the bullets recovered from the scene had been fired from said firearms. Also, a witness testified as to the victim's identity, and a pathologist gave evidence as to the two gun shot wounds to the body.

2.8 The author made an unsworn statement from the dock. He stated that on 26 December 1988 he was at home. He alleged that he did not tell Dwyer about any gun and that Plummer's evidence had been coerced by the police. He further claimed that he did not have a conversation with Adolphus Williams and he had never had any argument with him. His defence was one of alibi. There were no witnesses called for the defence.

3.1 On 30 June 1995, counsel for the author submitted a further communication, concerning the author's trial and conviction for another murder, on 28 October 1988, of one Joseph Hunter. The author was informed of this murder on 17 January 1989, after he had been already arrested for the murder of Angella Baugh-Dujon, following the discovery of Hunter's gun in the author's garden.

3.2 On 24 July 1991, the author was convicted for the murder of Mr. Hunter. His appeal was upheld by the Court of Appeal on 15 February 1993 and a retrial was ordered. This retrial resulted in a conviction for capital murder on 29 September 1993. The author's appeal was dismissed by the Court of Appeal on 18 July 1994, and his petition for special leave to appeal to the Privy Council was rejected on 25 May 1995.

3.3 At trial, the case for the prosecution was that on 28 October 1988, Joseph Hunter and Doreen McLean sat in a Volkswagen on Hill Road at St. Andres. Two men, one of them the author, approached the car, shot Hunter and killed him. The prosecution relied entirely on circumstantial evidence.

3.4 McLean testified that she was with Hunter that evening around 7 p.m., when she heard a male voice say "don't move", coming from the driver's side of the car, where Hunter was seated. Hunter seized a revolver and started firing. McLean heard an explosion, and realized Hunter was hurt. Hearing footsteps, she slipped out of the van and hid under it. She could see nothing from her hiding place but heard two male voices, one saying "You get the gun, you find the gun?", the other answering "Yes". After five minutes, she got out from under the van. Hunter was bleeding and did not speak to her.

3.5 The author's girlfriend Plummer again gave evidence that, on 7 January 1989, she showed the police the location of a black plastic bag in which two guns were found. She testified that the author had told her where to find them. She said that the guns, which according to her were in the author's possession since September, were previously kept under her bed, and that she had seen him rubbing one of the guns, to file off the number.

3.6 The police testified that one of the guns found in the author's garden bore the same serial number as Hunter's licensed gun. The ballistic expert gave evidence that two bullets found at the scene of the killing had come from the other gun found in the author's garden.

3.7 The author gave sworn evidence, stating that he knew nothing of the offense, that he had been at Plummer's house all day on 28 October 1988, assisting workmen in fixing the roof of the house. He said that the relationship between him and Plummer was not a good one and that she was telling lies. No witnesses were called on his behalf.

The complaint

4.1 As regards the arrest and trial for the murder of Angella Baugh-Dujon, the author claims that he was detained for three or four weeks without being charged, and alleges that this constitutes a violation of article 14, paragraph 3(a).

4.2 The author claims that he was beaten and verbally abused by two police officers, including a prosecution witness, after being taken into custody. The author complained to his solicitor, who did not take the matter further.

4.3 The author submits that he spent approximately one year and seven months in prison before trial, and that this constitutes a violation of article 14, paragraph 3(c).

4.4 The author also alleges that he was "roughed up" by the legal aid lawyer assigned to his case, who also cursed during his meetings with the author, and who did not accommodate the author's request to visit the scene of the crime. The author claims that he was only able to see his lawyer during the trial proceedings since the latter refused to grant private meetings to discuss the case. Also, the lawyer did not challenge the ballistic evidence, nor the credibility of the main prosecution witness. As such, the author alleges that the defence case was not put by his lawyer, who also did not make enough of an effort in raising a defence. The author also alleges that no defence was raised by the lawyer on appeal. The above is said to constitute a breach of article 14, paragraph 3(b) and (d).

4.5 The author claims further that the guarantee of a fair trial has been violated by the inadequacy of the trial judge's direction to the jury. The trial judge stated that both participants in a joint enterprise are liable "even if unusual consequences arise from the execution of the agreed joint enterprise". The author alleges that the trial judge fundamentally erred in not mentioning the mental element required in joint enterprise, i.e. that where one of the participants goes beyond what has been tacitly agreed as part of the common enterprise, the other participants are not liable for the consequences of that unauthorized act. Counsel for the author states that in the absence of the prosecution establishing that the author had fired the gun or that there was a joint enterprise to commit an offence that may result in grievous bodily harm being inflicted on another, it is impossible to say whether the jury would have convicted if directed properly. Furthermore, the author claims that the trial judge fundamentally erred in directing the jury that it was "safer and better" to convict on the basis of circumstantial evidence. Counsel also claims that the trial judge's direction on alibi evidence was fundamentally flawed since, by saying the author did not have to prove anything although he may attempt to do so, the judge gave the impression that the author had a duty to discharge. Nor did the trial judge direct the jury as to the standard of proof to be satisfied by the prosecution in proving that the alibi, once raised, is false.

4.6 The author also claims that due to the general prison conditions, and due to the limited medical attention he has received despite his asthmatic condition, he is the victim of a breach of article 10.

4.7 It is stated that the case has not been submitted to another procedure of international investigation or settlement.

5.1 As regards the arrest and trial concerning the murder of Mr. Hunter, the author states that, although he was informed by police officers that the weapons found in the grounds of his home connected him to the death of Mr. Hunter, he was not actually charged with murder until appearing before the Gun Court. The author claims that this was in violation of article 14, paragraph 3(a).

5.2 The author further states that he was ill-treated after his arrest, and that he was threatened by the investigating police officers that he would be killed if he did not admit to Mr. Hunter's murder.

5.3 The author emphasizes that it took approximately two and a half years before the original trial against him began, in violation of article 14, paragraph 3(c).

5.4 As regards his defence lawyer, the author states that he found it difficult to give him instructions, since he was clearly not interested, as demonstrated by his aggressive manner. Moreover, his lawyer had already left the Court when the verdict was passed and did not contact the author following his conviction. The author therefore contends that he was not in a position to adequately prepare his defence, in violation of article 14, paragraph 3(b).

5.5 The author also states that, after the Court of Appeal ordered a retrial, he objected to being represented by the same lawyer who had represented him at the original trial, since he felt that the handling of the case by this lawyer had led to his conviction. However, his objection was overruled by the Court.

5.6 The author further states that at the beginning of the retrial, he told the Court through his lawyer that he was not in a position to start the trial, but the trial judge overruled his request. It appears from the trial transcript that the judge was informed that the author had been examined by a medical doctor, who had declared him fit for trial, but that the author disagreed.

5.7 The author claims that article 14, paragraph 3(d), was violated in his case, since he only met his lawyer at the trial, his lawyer did not show him the prosecution statements, failed to challenge the credibility of the main prosecution witness Plummer, who was living with a policeman at the time of the trial, and failed to contact the author's only witness who could have testified that Plummer did not point out where the guns were hidden as she claimed.

5.8 The author also alleges that the judge did not properly instruct the jury with regard to the different factual situations that would arise from the evidence, the issue of recent possession, the value of circumstantial evidence, the evidential value of lies told by an accused, and the defence of alibi. According to the author, this amounts to a violation of article 14 in general.

State party's submissions and counsel's comments

6.1 By submission of 22 August 1995, the State party addresses the author's communication concerning his arrest and trial for the murder of Angella Baugh-Dujon, and states that it will investigate the author's allegation that he was ill-treated upon his arrest in December 1988.

6.2 As regards the author's claim that he was not charged until three to four weeks after his detention, the State party promises to investigate, although it will be difficult because seven years have passed since. Moreover, the State party points out that the right to be promptly informed of the charges is also protected by section 20(6)(a) of the Constitution and that the most appropriate place to raise this issue would have been at trial, which the author failed to do.

6.3 The State party further contends that a period of one year and seven months before bringing the author to trial does not constitute unreasonable delay, since the preliminary inquiry was held during this period.

6.4 As regards the conduct of the author's counsel at trial, the State party submits that once it has provided competent counsel for indigent prisoners it is not responsible for the manner in which counsel conducts the case. Furthermore, the State party points to inconsistencies in the author's allegations, since at one point he says that he saw his counsel before the trial, whereas at another point he states that he only saw his counsel during the trial.

6.5 As regards the author's allegations relating to the judge's instructions to the jury, the State party refers to the Committee's jurisprudence that it is not for the Committee to review them, unless the instructions were clearly arbitrary or amounted to a denial of justice or the judge otherwise violated his obligation of impartiality. The State party notes that there is nothing in this case which would justify an exception from this principle.

6.6 Finally, the State party informs the Committee that according to the records of the Court of Appeal, the author's offence with regard to the murder of Angella Baugh-Dujon was classified as non-capital murder.

6.7 As regards the author's claim that he is not properly treated for his asthma while in prison, the State party contests that this constitutes a violation of article 10 of the Covenant. It states that due to lack of resources in the correctional system medication is not always available. If it is, it is given to the author. The State party points out that the fact that the author can procure medication elsewhere without interference indicates that the difficulty is a regrettable result of lack of resources rather than a deliberate attempt to ill-treat the author.

7. In a second submission, the State party addresses the author's communication with respect to the conviction for the murder of Mr. Hunter. The State party notes that the allegations in the two cases are almost identical and refers therefore to its first submission. As regards the author's allegation that he was not informed of the charges against him concerning the murder of Mr. Hunter, the State party notes that the time period of not having been informed is different from the first case, but that the same principle applies.

8.1 In her comments on the State party's submission, counsel submits that the fact that the issue of the delay in charging the author was not raised at the preliminary inquiry or at trial is another illustration of the inadequacy of the author's defence.

8.2 Counsel clarifies that the author did see his counsel before the trial, and that his allegations that he only saw his counsel during the trial relate to the fact that, although he asked for time with his counsel, counsel did not grant him a private meeting but only saw him at the hearings.

8.3 Counsel submits that the author's allegations in respect of the judge's instructions amount to clear evidence that the judge was arbitrary, denied the author justice and violated the obligation of impartiality. As a result, the jury was never able to consider matters of law which were of fundamental importance in the case.

9.1 Counsel specifies that the author was actually never charged with the murder of Mr. Hunter, but simply told at the preliminary hearing that he had been charged with this murder.

9.2 Counsel submits that the misdirections by the trial judge in the trial concerning the murder of Mr. Hunter were so fundamental that they clearly amounted to a denial of justice.

The Committee's admissibility decision

10. At its 58th session, the Committee considered the admissibility of the communication.

11.1 As regards the author's claim relating to his arrest and trial for the murder of Angella Baugh-Dujon, the Committee ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

11.2 The Committee noted that the State party had not objected to the admissibility of the communication for failure to exhaust domestic remedies. In the circumstances, the Committee considered that it was not precluded by article 5, paragraph 2(b), of the Optional Protocol from examining the claims on their merits.

11.3 The Committee noted that part of the author's allegations related to the evaluation of evidence, to the instructions given by the judge to the jury and to the conduct of the trial. The Committee referred to its prior jurisprudence and reiterated that it was generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee did not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

11.4 As regards the author's allegation with respect to the conduct of the defence by his legal aid lawyer, the Committee recalled its jurisprudence[1] that the State party could not be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, nothing in the file showed that this was so and therefore this part of the communication was inadmissible under article 2 of the Optional Protocol.

11.5 The Committee noted the State party's undertaking to investigate the author's complaint that he was ill-treated by police officers upon arrest after being taken into custody, as well as his claim that he was not informed promptly of the charges against him. The Committee considered that these claims might raise issues under articles 7 and 10, and articles 9, paragraph 2, and 14, paragraph 3(a), respectively, which needed to be considered on the merits.

11.6 The Committee noted the State party's statement that the delay between the author's arrest and the beginning of the trials against him was not unduly long, since the preliminary inquiry was held during this period. The Committee considered however that the question of whether or not the delay was in violation of articles 9, paragraph 3, and 14, paragraph 3(c), was a matter to be considered on the merits. It invited the State party to provide more precise information as to the investigations carried out during the period between arrest and the preliminary enquiry and to inform the Committee of the exact dates of the preliminary hearings.

12.1 As regards the author's claim relating to his arrest and trial for the murder of Mr. Hunter, the Committee ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

12.2 The Committee noted that the State party had not objected to the admissibility of the communication for failure to exhaust domestic remedies. In the circumstances, the Committee considered that it was not precluded by article 5, paragraph 2(b), of the Optional Protocol from examining the claims on their merits.

12.3 he Committee noted that part of the author's allegations related to the evaluation of evidence, to the instructions given by the judge to the jury and to the conduct of the trial. The Committee referred to its prior jurisprudence and reiterated that it was generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee did not show that the trial judge's instructions or the conduct of the trial suffered from such defects. In particular in respect to the author's condition to stand trial, the Committee noted that the judge based his decision on a medical examination of the author, and his denial of the author's request thus could not be said to have been arbitrary. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

12.4 The Committee considered that the author's claim that the police officers threatened to kill him should he not confess to Mr. Hunter's murder might raise an issue under articles 7 and 14, paragraph 3(g), of the Covenant which needed to be considered on the merits.

12.5 As regards the author's claim that he was never actually charged with the murder of Mr. Hunter, but told at the preliminary enquiry that he had been charged, the Committee considered that this might raise an issue under article 9, paragraph 2, of the Covenant which needed to be considered on the merits.

12.6 The Committee noted the State party's statement that the delay between the author's arrest and the beginning of the trial against him was not unduly long, since the preliminary inquiry was held during this period. The Committee considered however that the question whether or not the delay was in violation of articles 9, paragraph 3, and 14, paragraph 3(c), was a matter to be considered on the merits. It invited the State party to provide more precise information as to the investigations carried out during the period between arrest and trial and the preliminary hearings held.

12.7 The author claimed that he had objected to being represented at the retrial by the same lawyer who represented him at the first trial for the murder of Mr. Hunter because of alleged errors made by this lawyer, but that this objection was overruled by the Court. The Committee considered that this claim might raise an issue under article 14, paragraph 3(d), of the Covenant which needed to be examined on the merits. The Committee invited counsel to present more precise information concerning this claim, in particular when the objection was made, before which Court, and on what basis it was rejected.

13. The Committee further considered that the question whether the circumstances of the author's detention, as aggravated by his asthmatic condition, constituted a violation of article 10, paragraph 1, should be considered on the merits.

14. Accordingly, on 17 October 1996, the Human Rights Committee decided that the communication was admissible:

- as regards the author's arrest and trial for the murder of Angella Baugh-Dujon, insofar as it relates to the author's alleged ill-treatment upon and following his arrest, the alleged delay in charging him and the alleged delay in bringing him to trial,

- as regards the author's arrest and trial for the murder of Mr. Hunter, insofar as it relates to the alleged threats from police officers to kill him, the alleged failure to charge him, the alleged delay in bringing him to trial and the author's objection to being represented by his lawyer at the retrial,

- insofar as it relates to the author's conditions of detention.

State party's submissions on the merits and counsel's comments thereon

15.1 By notes of 20 March and 18 April 1997, the State party replies to the Committee's decision on admissibility. It informs the Committee that its investigations have not found any evidence in support of the allegation that the author was verbally abused and beaten by police officers after having been taken into custody. The State party further notes that these allegations were not made either at the preliminary inquiry or the trial. In conclusion, the State party denies that the ill-treatment ever took place.

15.2 The State party also submits that its investigations have found no evidence to substantiate the author's claim that he was not charged until four weeks after his arrest, and concludes that there has been no violation of the Covenant.

15.3 The State party reiterates its view that a delay of one year and seven months between arrest and trial does not constitute undue delay within the meaning of the Covenant. It states that the fact that a preliminary hearing was held during this time means that the criminal trial process had begun and therefore there was no breach of the Covenant.

16.4 In respect of the Hunter murder charge, the State party submits that investigations have yielded no proof in support of the allegation that police officers threatened to kill him.

16.5 Further, the State party notes that it is clear from the author's own statements that he was informed that he had been detained in connection with

Mr. Hunter's murder and that evidence had been found at his home to connect him to the crime. The author's claim that he was not charged until he appeared in Gun court therefore must relate to the formal arraignment. The Ministry denies that there was a breach of the Covenant.

16.6 In respect of the delay between arrest and trial, the State party refers to its observations above.

16.7 In respect of the allegation that the author's request for a new counsel was rejected, the State party states that it would need more information from the author in order to comment on the allegation. It notes that the trial transcript does not show that the author objected to being represented by the same counsel.

17.1 In his comments on the State party's submission, counsel notes that the State party does not give details about its investigations into the author's complaint that he was beaten by the police upon arrest and that its results are thus not persuasive. The author wished to make a complaint, but did not know how and thought it would be too difficult.

17.2 In an affidavit given by the author on 9 September 1997, the author affirms that he was beaten in December 1988 by two police officers, whom he mentions by name, in Constant Spring Police Station. As a consequence, he suffered swellings to his head and bruising to his ribs and shoulders. He did not receive any medical treatment and the injuries took three weeks to heal.

17.3 With regard to the author's claim that he was not charged until four weeks after his arrest, counsel notes that the State party has offered no evidence to refute this claim.

17.4 With regard to the delay in bringing the author to trial, counsel notes that the State party has not furnished the precise information requested by the Committee in its decision on admissibility. In the light of this failure, counsel argues that the State party has not been able to justify the delay. With regard to the State party's argument that the criminal trial process had started with the preliminary enquiry and that thus no violation occurred, counsel notes that such an interpretation is open to abuse in that an early preliminary hearing could be heard and then the trial delayed for an indefinite time thereafter.

18.1 In his affidavit of 9 September 1997, the author states that during the initial interrogation by the police, he was told that if he refused to cooperate by admitting to the murder of Mr. Hunter he would be taken away and killed. Later, he was informed that he would be taken outside, forced to run and then shot as an escapee if he did not cooperate. In this regard, counsel refers to his remarks reflected in paragraph 17.1 above.

18.2 With regard to the author's claim that he was not charged with Mr. Hunter's murder until his appearance in Gun court, counsel notes that even if the author was informed of the information linking him to the murder of Mr. Hunter, this is not the same as actually charging the author with the murder. In the absence of evidence that the author was indeed charged, counsel argues that there has been a violation of article 9 of the Covenant.

18.3 Counsel notes that the delay between the author's arrest and his first trial in the murder of Mr. Hunter was thirty months. Counsel refers to its comments in paragraph 16.5 above, and submits that such a delay is in violation of articles 9(3) and 14(3)(c).

18.4 Counsel acknowledges that the trial transcript does not reflect that the author objected to being represented by the lawyer who had represented him at the first trial, but submits that the transcript does not record everything said in Court. Counsel submits that the author's objection was made on 27 September 1993, and that in reply to his objection the trial judge stated that the lawyer did not get paid much to defend legal aid cases, so the author had to go on with him. Counsel also refers to pages 2 to 5 of the trial transcript from which it transpires that the author refused to plea, and argues that this was because he tried to communicate with the judge that he did not want to be represented by his lawyer.

18.5 In his affidavit of 9 September 1997, the author explains that because of his unpleasant experiences with his lawyer, he protested strongly, but that the judge told him that he had to go on with him. He states that he does not know why this conversation is not reflected in the trial transcript. According to the author, when he objected again, the judge did not allow him to speak, but told him to speak to his lawyer.

19.1 With regard to the conditions of detention, the author states that the block in which he is detained was searched on 5 March 1997. He was ordered to come out of his cell and beaten. His possessions were burned. He complained to the superintendent, but apparently nothing was done about it. The author also claims that one warder took $1,600 away from him, and he was told it was confiscated. It is submitted that the author was locked up in his cell on 12 August 1997 without food or water for the whole day, and was allegedly threatened when he asked for some water.

19.2 Counsel submits that the author has suffered eye problems caused by the darkness in his cell. He attended the eye clinic in Kingston on 25 May 1994, but did not receive a prescription apparently until one year later. The glasses he then received proved too strong for him. Requests for a re-examination were delayed, and when other glasses were finally obtained, they were destroyed in the incident on 5 March 1997.

Issues and proceedings before the Committee

20. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

Claims relating to the charge for the murder of Baugh-Dujon

21.1 With respect to the author's claim that he was beaten by police officers in December 1988, after his arrest, the Committee notes that the officers named by the author as being responsible for the beatings, gave evidence at the trial against him. At no point during the cross-examination of these witnesses, did counsel for the author put the claim to them that they had beaten the author. Nor did the author mention the beatings in his unsworn statement at the trial. In the circumstances, the Committee finds that the author's claim that he was beaten by the police officers upon his arrest is unsubstantiated.

21.2 The author has alleged that he was not informed of the charges against him until three or four weeks after his arrest. The Committee notes that the State party has replied that there is no evidence in substantiation of the complaint. The Committee finds that this general refutation by the State party is not sufficient to disprove the author's claim. In the absence of any specific information from the State party on which date the author was charged with the offence, the Committee considers that the author's allegation is substantiated. The Committee finds that a delay of three or four weeks in charging the author is in violation of article 9, paragraphs 2 and 3, of the Covenant.

21.3 The Committee notes that the author was arrested on 30 December 1988 and that the trial against him began on 23 July 1990, a year and a half later. The Committee finds that such a delay in bringing an accused to trial is a matter of concern, but is of the opinion that it does not amount to a violation of articles 9, paragraph 3, since he was detained on a murder charge, and 14, paragraph 3(c), because the preliminary enquiry took place during that period.

Claims relating to the charge for the murder of Hunter

22.1 With respect to the author's claim that he was threatened by police officers if he were not to admit to the murder of Mr. Hunter, the Committee notes that the officers named by the author as being responsible for the threats, gave evidence at the trial against him. At no point during the cross-examination of these witnesses, did counsel for the author put the claim to them that they had threatened the author. Nor did the author give evidence to this effect at the trial. In the circumstances, the Committee finds that the author's claim that he was threatened by the police officers is unsubstantiated.

22.2 The Committee notes that the author's claim that he was not formally charged with the murder of Mr. Hunter until he appeared before the Gun Court is unchallenged by the State party. The Committee regrets that the State party has failed to provide the date of the hearing before the Gun Court. In the circumstances, the Committee considers that the State party has failed to provide sufficient information which would show that the author was promptly charged and brought before a judge or judicial officer in relation to the Hunter murder charge. The facts before the Committee thus reveal a violation of article 9, paragraphs 2 and 3, of the Covenant.

22.3 When the author was first informed of the charges against him concerning the murder of Mr. Hunter, he was in detention in connection with the murder of Ms. Baugh-Dujon. He was subsequently convicted of this later murder, before his trial in the Hunter case began. As the author was lawfully being detained in the Baugh-Dujon case, he had no right to be released in the Hunter case. Article 9 was therefore not violated. However, the trial in the Hunter case did not take place for two and a half years after he was first charged with the Hunter murder. In the absence of an explanation by the State party for this delay, the Committee finds that the delay amounted to a violation of the author's right under article 14, paragraph 3 (c) of the Covenant, to be tried without undue delay.

22.4 With regard to the author's claim that he objected to being represented by the same defence counsel at the beginning of the retrial in the Hunter murder, the Committee notes that in the absence of any written record of such protest, the facts before it do not substantiate a violation of article 14 of the Covenant.

Circumstances of detention

23.1 The Committee notes that the author has not provided any further information in respect to his initial complaint that the prison conditions affected his asthma. The Committee therefore finds no violation in this respect.

23.2 In recent submissions, the author has claimed that his deteriorating eyesight has not been properly treated. However, the Committee finds that he has not substantiated that the difficulties in obtaining proper treatment amount to a violation of article 10, paragraph 1, of the Covenant.

23.3 The author has also referred to two specific incidents, on 5 March and 12 August 1997, during which he claims he was ill-treated by the warders and on one occasion, all his belongings were destroyed. The State party has not replied to these allegations, although it had an opportunity to do so. In the circumstances, the Committee concludes that the author was subjected to treatment in violation of articles 7 and 10, paragraph 1, of the Covenant.

Conclusion

24. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraphs 2 and 3, 10 and 14, paragraph 3 (c), of the Covenant.

25. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Everton Morrison with an effective remedy, including compensation and commutation. The State party is under an obligation to ensure that similar violations do not occur in the future.

26. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

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[1] **See decision declaring communication No. 536/1993 inadmissible,** CCPR/C/53/D/536/1993, para. 6.3.

APPENDIX

Individual opinion by Ms. Cecilia Medina Quiroga (partly dissenting)

1. I regret to dissent from the majority decision with regard to paragraphs 21.3 and 22.3 of these Views.

2. In paragraph 21.3 the Committee finds that a delay of a year and half to bring an accused to trial for the murder of Baugh-Dujon is a matter of concern but does not amount to a violation of article 9, paragraph 3. In my opinion, if a delay is a matter of concern, the Committee cannot conclude that there is no violation unless the State has given an explanation about the reasons for the delay. This was the Committee's position when deciding on the admissibility of the complaint, since it stated that the question of the delay should be considered on the merits and invited the State party "to provide more precise information as to the investigations carried out during the period between arrest and the preliminary inquiry and to inform the Committee of the exact dates of the preliminary hearings" (para 11.6). The State responded to this invitation by repeating the explanation given at the admissibility stage, namely that "the fact that a preliminary hearing was held during this time means that the criminal trial process had begun" (paras 6.3 and 15.3). In my opinion, given this answer, there is no other possibility than finding that the State violated article 9.3 for not having brought the complainant to trial for the murder of Baugh-Dujon without undue delay.

3. In paragraph 22.3 the Committee finds that there is no violation of article 9.3 with respect to the alleged undue delay in bringing the complainant to trial for the murder of Hunter, because "[a]s the author was lawfully being detained in the Baugh Dujon case, he had no right to be released in the Hunter case". I cannot agree with this conclusion. In the first place, I am of the opinion that each detention has to comply with, and be examined in, the light of article 9.3. In the instant case, the Committee should have examined whether the State could either have released the complainant or have submitted him to trial sooner, since that is the alternative which article 9.3 offers, instead of considering that as the complainant was already in lawful detention there was no point in examining the possible violation of article 9.3. Secondly, even if the Committee considered that examining the situation of the complainant as to his detention for the murder of Hunter would amount to an academic exercise, I think it was the Committee's duty to carry out this exercise, if only to send the appropriate message to all States parties to the Covenant as to the independent character of each detention for the purposes of article 9.3. Furthermore, examination of the delay to bring the complainant to trial for the murder of Hunter brings me to the conclusion that, again in this regard, there is a violation of article 9.3, because there is no reasonable explanation for the long delay during which the complainant was kept in detention and without trial. I do not dissent from the conclusion reached by the Committee in this paragraph that a violation of article 14, paragraph 3 (c) has also occurred.

(Signed) Cecilia MEDINA QUIROGA

(Original: English)

Individual opinion (partly dissenting) by Mr. Justice P.N. Bhagwati, co-signed by Mr. Nisuke Ando, Mr. Th. Buergenthal and Mr. Maxwell Yalden.

We have gone through the majority opinion of the Human Rights Committee in the case of Everton Morrison v. Jamaica. We agree with the view expressed in the majority opinion, save and except in regard to violation of Article 14, paragraph 3(c) of the Covenant.

The majority members have taken the view that there was undue delay in bringing the author to trial after he was charged and that this delay constituted a violation of the author's right under Article 14, paragraph 3(c) of the Covenant. When the author was first charged for the murder of Hunter, he was in detention in connection with the murder of Ms. Baugh-Dujon. Since the author was lawfully detained in connection with the murder of Ms. Baugh-Dujon, he had no right to be released in Hunter's case and there was accordingly no violation of Article 9, paragraph 3 of the Covenant. He was then tried and convicted of the murder of Ms. Baugh-Dujon on 25 July 1990 and consequently his detention continued. It is true that there was a delay of two and a half years between the date the author was charged for the murder of Hunter on 17 January 1989 and the date, namely 24 July 1991, when he was brought to trial and convicted of the murder of Hunter. But it must be remembered that during this period he was tried and convicted for the murder of Ms. Baugh-Dujon on 25 July 1990 and there was therefore effectively only a delay of 12 months before he was brought to trial and convicted for the murder of Hunter on 24 July 1991. The delay in bringing the author to trial for the murder of Hunter cannot, therefore, be regarded as undue delay, and there was accordingly no violation of Article 14, paragraph 3(c), of the Covenant.

(Signed) N. ANDO

(Signed) P. N. BHAGWATI

(Signed) Th. BUERGENTHAL

(Signed) M. YALDEN

(Original: English)

O. Communication No. 650/1995, Perel v. Latvia* (adopted on 30 March 1998, sixty-second session)

Submitted by:	Meer and Shulamit Vaisman
Victim:	Their nephew, Martin Perel
State party:	Latvia
Date of communication:	31 May 1995 (initial submission)
Date of decision on admissibility:	3 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 1998,

Having concluded its consideration of communication No.650/1995 submitted to the Human Rights Committee by Mr. Martin Perel, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Meer and Shulamit Vaisman, citizens of the United States. They submit the communication on behalf of their nephew, Martin Perel, who is currently in prison in Latvia. They claim that Mr. Perel is a victim of violations by Latvia of article 14 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Latvia on 22 September 1994.

The facts as submitted by the authors

2.1 Mr. Perel was convicted on 29 June 1993 of organizing the murders, on 31 August 1992, of Vladimir Yermolenko and Nikolai Shevchuk and sentenced to 15 years' imprisonment. His conviction was upheld on 30 September 1993 by the Judicial Board for Criminal Cases of Latvia's Supreme Court. A second appeal to the Board, on 31 January 1994, was dismissed on 14 March 1994. The Supreme Court Plenum, on 19 December 1994, considered the request for review, but refused to impose a lesser sentence, finding that Mr. Perel was, indeed, the organizer of the murders.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Thomas Buergenthal, Lord Colville, Ms. Ch. Chanet, Mr. Omran el Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 Mr. Perel's co-defendants, all of whom were convicted of the perpetration of the murder, were Yakov and Felix Lokshinsky, Andrei Volkov and Vadim Rokotov. Yakov Lokshinsky, who admitted to the murders, also received a 15 years' sentence, while his accomplices received lesser sentences.

2.3 At the trial, the case for the prosecution was that, on 31 August 1992, Yakov Lokshinsky and his accomplices carried out the order placed by Martin Perel to murder Vladimir Yermolenko and Nikolai Shevchuk, the president and vice-president of the store Three Stars. Alexander Plyachenko, a visitor to the store at the time, was also killed. All three men were stabbed to death in the store premises. The prosecution's case was mainly based on the testimony of Yakov Lokshinsky, who confessed to the crime and implicated Mr. Perel as the organizer of the crime. Lokshinsky asserted that Mr. Perel had promised him legal assistance to put the investigators "on the wrong track", 5,000 rubles and ownership of the Health Improvement Complex, a facility operated by the management of Three Stars. He also alleged that Mr. Perel had familiarized him with the layout and work schedule of the store in anticipation of the murders.

2.4 The motive of Mr. Perel was established by the prosecution to be "selfish reasons" to obtain sole ownership of the store Three Stars from his co-owners Vladimir Yermolenko and Nikolai Shevchuk, since the association was set to be dissolved and the property divided on 1 September 1992. Mr. Perel has, however, contended throughout the proceedings that he had no motive to murder any of the deceased. It is asserted that the business was owned by Mr. Yermolenko and Mr. Perel, and not Mr. Shevchuk, who was just an employee. In addition, it is contended that the company had no assets and, in fact, was in debt due to loans Mr. Yermolenko had taken out. Passing of ownership in the case of death would also not have been from one business associate to the other, but to the heirs, in this case Mrs. Yermolenko. It is asserted that she was the company's bookkeeper and, as such, was fully informed about the affairs of the business and capable of running it.

2.5 The author state that the prosecution attached great weight on the confession and testimony if Mr. Lokshinsky, because it was contended that he had turned himself in to the police voluntarily on 3 September 1992. The Deputy Police Commissioner and Chief of Detectives, however, issued a statement denying that Mr. Lokshinsky turned himself in and asserting rather that he had been arrested at the initiative of the police. The statement was quoted in several newspapers, including the 9 June 1993 issue of "Diyena" and the 27 August-2 September 1993 issue of "The Baltic Observer".[1]

2.6 The authors submit that Mr. Lokshinsky's initial confession to the police did not contain any mention of involvement by Mr. Perel and such mention was only made in later testimony allegedly at the direction of the Attorney-General's Office and the trial court. It is claimed that Mr. Lokshinsky stated in his initial confession, made on 3 September 1992, that he had not wanted to kill anyone, and only when Mr. Yermolenko started to insult and humiliate him did he attack and kill the three individuals at the store. No mention was made of Mr. Perel or anyone else ordering the perpetration of the murders.

2.7 In addition, it is contended that because Mr. Lokshinsky was the director of the Health Improvement Complex and an executive of Three Stars, he knew that the Complex (premises and enterprise) was not owned by Three Stars and that it would have been impossible for Mr. Perel to give it to him. As an employee of Three Stars, he was also already familiar with the layout and work schedule of the store, without being shown this specifically for the purpose of facilitating the murders.

2.8 It is also asserted that the Attorney-General's Office was aware that the Health Improvement Complex was not owned by Three Stars because the Attorney-General was personally involved in a bitter dispute with Mr. Yermolenko regarding the validity of the rental contract for the Complex premises. The Attorney-General, in a letter dated 21 July 1992, told him that the business' activities were illegal because the underlying contract was invalid and asked him to vacate the Complex premises. In a letter to the editor of a local newspaper, published in August 1992, a few weeks before the murders, Mr. Yermolenko accused the Attorney-General's Office of having organized crime connections. In the same letter, he appealed for help, stating that the Three Stars management felt threatened by a competitor with whom they had serious conflicts. It is alleged that the authorities failed to investigate these conflicts as a potential motive for the murders.

2.9 At trial, Mr. Lokshinsky contradicted his statement to the police and testified that Mr. Perel had not promised him anything, but rather had threatened him and his family. Subsequently, in a letter dated 27 January 1994 to the Supreme Court of Latvia and in a letter dated 3 May 1995 to the Chief Justice, he stated that he had given false testimony at trial in order to limit his own responsibility and escape the death penalty. He also admitted that his accomplices who had corroborated his evidence had nothing to do with the case and had lied, at his request, in order to implicate Mr. Perel. He also requested the Supreme Court to drop all charges against all his co-defendants, including Mr. Perel.

2.10 The authors inform the Committee that a group of writers, jurists and journalists have formed an International Committee in Defense of Martin Perel, and have appealed to the Latvian authorities for Mr. Perel's release.

The complaint

3. The authors allege that Mr. Perel's right to a fair trial and his right to presumption of innocence under article 14, paragraphs 1 and 2, of the Covenant have been violated.

State party's observations on admissibility and author's comments thereon

4.1 By submission of 9 February 1996, the State party confirms that the Supreme Criminal Court by judgment of 29 June 1993 sentenced Mr. Perel to 15 years' imprisonment, for arranging the deaths of the president and vice-president of Three Stars. This conviction was confirmed on 30 September 1993. On 14 March 1994, the Presidium of the Supreme Court rejected objections made by its vice-chairman with regard to the reclassification of the crime of the younger brother of Mr. Yakov Lokshinsky and with regard to the sentences of Mr. Perel and Mr. Yakov Lokshinsky. On 19 December 1994, the plenary of the Supreme Court, reviewing the presidium's decision, reclassified the crime of the younger brother, but confirmed Mr. Perel's conviction and sentence.

4.2 The State party further points out that under Latvian criminal law, a trial can be reopened on the basis of new evidence. Accordingly, in view of Mr. Perel's and Mr. Lokshinsky's protestations, the Supreme Court has made an application to the Chief Prosecutor to see whether the availability of new evidence would justify a retrial. The State party concludes therefore that all domestic remedies have not yet been exhausted.

5.1 In their comments on the State party's submission, the authors reiterate their previous statements that Mr. Perel is innocent and that the attributed motive for ordering the murders did not exist. They further point out that one of the murder victims was indeed the president of Three Stars, but the other just a regular employee, and not vice-president as the State party suggests.

5.2 The authors further state that Mr. Perel's counsel has repeatedly written to the Chief Justice and Prosecutor General in order to show that Mr. Perel had become victim of a fabricated case. On 16 January 1996, the Chief Justice sent the case to the Prosecutor General of Latvia under articles 388 to 390 of the Code of Criminal Procedure. Article 388 provides for the reopening of a case in the light of new circumstances, inter alia when a sentence was based on deliberate false witness testimony. On 20 February 1996, in a letter to Mr. Perel's father, the Prosecutor General's Office stated that, after having conducted several investigations, the case would not be reopened. By letter of 1 March 1996, Mr. Perel's counsel protested the decision not to reopen the case. On 15 March 1996, the Prosecutor General's Office responded that it was still in the process of verifying the new evidence in the case. The authors point out that it is now more than three months since the request for reopening of the case was made and that the case has still not been reopened. They contend that the refusal by the Prosecutor General to reopen the case amounts to a violation of article 2, paragraph 3(b), of the Covenant.

The Committee's admissibility decision

6.1 At its 57th session, the Committee examined the admissibility of the communication. It noted the State party's argument that the communication was inadmissible for non-exhaustion of domestic remedies, since the Chief Prosecutor had not yet decided whether or not to order a retrial. The Committee considered, however, that a request to reopen a case on the basis of new evidence, once regular remedies have been exhausted, does not form part of the domestic remedies that must be exhausted in order to satisfy the admissibility requirement set forth in article 5, paragraph 2(b), of the Optional Protocol. The Committee was therefore not precluded by article 5, paragraph 2(b), of the Optional Protocol from examining the communication.

6.2 The Committee noted that the State party had not raised any other objections to admissibility and considered that the communication should be examined on the merits, in particular in respect to the way in which the State party's authorities assessed or failed to assess the retraction by the main witness of the statement inculpating Mr. Perel, which may raise issues under article 14, paragraph 1, of the Covenant. In this connection, the Committee wished to receive precise information from the State party on the steps taken to investigate Mr. Lokshinsky's assertion of 27 January 1994, repeated on 3 May 1995, that he had given false evidence at trial.

7. On 3 July 1996, the Human Rights Committee therefore decided that the communication was admissible.

Submissions from the parties concerning the merits of the communication

8.1 In a further submission, the authors of the communication submit that on 17 July 1996, Mr. Perel's counsel was notified by the Prosecutor General's office that his request to reopen the case was rejected. His appeal against this decision was turned down on 23 August 1996. Under Latvian law, reopening of cases is allowed only when there are circumstances, not known to the court when the sentence was imposed, which alone or in conjunction with earlier established circumstances, exonerate a convicted person, or reduce his guilt.

8.2 In the decision of 17 July 1996, the Prosecutor's Office recalls that, in his petition to the Supreme Court of 27 January 1994, confirmed that he had committed the crime because he was under threat by Mr. Perel. He also stated that Mr. Perel had tried to make him change his testimony. In other submissions, Lokshinsky indicated that his testimony at trial was false, and that his co-accused were innocent, and that he himself had only been a witness to the murders which he had not been able to prevent. The Prosecutor's Office considered that, in view of all the circumstances in the case, and observing that Mr. Lokshinsky did not provide specific details of the new version of events, there was no reason to reopen the case. In this context, it is stated that a witness, who died according to Lokshinsky, was in fact still alive and denied having been on the site of the crime.

8.3 From the decision of 23 August 1996, it appears also that the Prosecutor was of the view that Mr. Perel had been convicted on the basis of other evidence than just the testimony of Lokshinsky, which was corroborated by other testimonies and circumstantial evidence.

8.4 The authors argue that there is no substantiation for the Prosecutor's statement that Lokshinsky was put under pressure by Mr. Perel and his family. Neither has Lokshinsky's statement at the trial, that he committed the crime because Mr. Perel threatened him with reprisal, been substantiated by evidence, according to the authors. They argue that reopening of the case would clarify many issues of facts and evidence, and maintain that Mr. Perel was convicted solely on the basis of Lokshinsky's evidence against him. They contend that Mr. Perel's conviction and the subsequent failure to reopen his case, are the result of anti-semitism.

8.5 The authors provide a copy of a statement by Mr. Lokshinsky, dated 7 June 1995, in which he states that he gave false testimony during the trial because of pressure by the investigators. They also provide a copy of a statement of 21 June 1996, in which he denies that he turned himself in to the police and denies that he was ever promised a reward of 5000 rubles. In the statement, Lokshinsky also states that, during the pre-trial examination, he was visited by representatives of a law firm who offered him a million rubles (about $ 8,000) if he would change his testimony saying that the murders were committed in the course of a spontaneous argument.

9.1 In its observations, dated 14 February 1997, under article 4 of the Optional Protocol, the State party explains that in 1996 the Supreme Court reviewed repeated complaints by Mr. Lokshinsky and Mr. Perel, in order to decide whether a new hearing was justified. After revision of the case the Supreme Court forwarded a petition to the General Public Prosecutor. On 17 July 1996, the Prosecutor's Department rejected the petititon, as no new circumstances were found to justify the reopening of the case.

9.2 The State party submits that the court proceedings were fair and that no violations of the Covenant have taken place. In this context, the State party submits that Mr. Perel was found guilty on the basis of all the evidence gathered in the case.

9.3 With regard to the statements of Mr. Lokshinsky, the State party submits that he has been put under pressure by Mr. Perel to obtain his release.

9.4 The State party provides an English translation of the Supreme Court's verdict of 29 June 1993. It appears from the Court judgment that there was evidence that the work relations between Mr. Perel on the one hand and Mr. Yermolenko and Mr. Shevchuk on the other had become conflictuous and that Mr. Yermolenko and Mr. Shevchuk had decided to terminate the arrangement. The State party also provides a translation of the appeal judgement of the Supreme Court of 30 September 1993, of the verdict of the Presidium of the Supreme Court, dated 14 March 1994, and of the verdict of the Supreme Court's Plenum of 19 December 1994.

9.5 From the translation of the letter, dated January 1996, of the Chairman of the Supreme Court, it appears that Mr. Lokshinsky petitioned the Court on 27 January, 3 May and 6 June 1994, stating that all depositions given by him during the investigation and court proceedings had been guided by the desire to survive, that they were false, and that the co-accused had testified at his request that the murder was ordered by Mr. Perel. The Chairman of the Supreme Court pointed out contradictions in the evidence and forwarded the request for reopening of the case to the Public Prosecutor, invoking Mr. Lokshinsky's petitions as new facts. By decision of 17 July 1996, the Public Prosecutor rejected the request for reopening. It was considered that in his statements Mr.Lokshinsky had stated that he had been put under pressure by Mr. Perel, and that, other than denying his testimony given at the trial, he did not provide any specific information contradicting the findings of the court. The Prosecutor also refers to press articles, and states that investigations confirmed the evidence on which the Court's judgment was based, and contradicted the versions published in the press. An alleged witness reported to be killed, was in fact alive and denied having been witness to the murder. The Prosecutor rejected the claim that Mr. Perel's conviction was an expression of anti-semitism. On the basis of the outcome of his investigations, the Prosecutor declined the reopening of the case.

10. In their comments on the State party's submission, the authors emphasize the contradictions in the evidence as put forward by the President of the Supreme Court, and conclude that this shows that the evidence against Mr. Perel was fabricated. The failure of the Prosecutor to reopen the case is said to constitute a violation of article 2, paragraph 3(a), of the Covenant.

11.1 In a further submission of 25 July 1997, the State party provides a copy of a "Compatibility Exercise of Latvian legislation to the European Convention on Human Rights". It explains that a new penal code has been elaborated with the assistance of experts from the Council of Europe.

11.2 Concerning the case of Mr. Perel, the State party submits that he has been transferred to a less strict detention regime on 20 June 1996. The State party further denies the authors' suggestion that the judgement in his case was inspired by anti-semitism, stating that the Prosecutor has investigated these allegations and found them groundless.

Issues and proceedings before the Committee

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.2 The Committee recalls its jurisprudence that it is generally not for the Committee, but for the courts of States parties, to evaluate facts and evidence in a specific case, unless it can be ascertained that the evaluation was manifestly arbitrary or amounted to a denial of justice. The Committee has carefully examined the Court judgments in the instant case, and considers that the trial did not suffer from such defects.

12.3 With regard to the authors' argument that the State party's failure to reopen the case against Mr. Perel constitutes a violation of the Covenant, the Committee notes from the materials presented to it that the statements by Mr. Lokshinsky, revoking the evidence he gave at trial, were examined by the competent authorities, and that Mr. Perel's counsel was given an opportunity to present observations and arguments. In the circumstances, the Committee considers that there is no substantiation for the contention that the decision not to reopen the case was manifestly arbitrary or amounted to a denial of justice.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the provisions of the Covenant.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

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[1] It does not appear that this statement was made in court as well.

P. Communication No. 651/1996, J. Snijders, A. A. Willemen and Ch. C. M. Van der Wouw* (adopted on 27 July 1998, sixty-third session)

Submitted by:	J. Snijders, A. A. Willemen and Ch. C. M. Van der Wouw (represented by Kalbfleisch, Van der Blom & Fritz)
Victim:	The authors
State party:	The Netherlands
Date of communication:	26 August 1994 (initial submission)
Date of decision on admissibility:	14 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 1998,

Having concluded its consideration of communication No.651/1995 submitted to the Human Rights Committee by J. Snijders, A. A. Willemen and Ch. C. M. Van der Wouw, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are J. Snijders, A. A. Willemen and Ch. C. M. van der Wouw, Dutch citizens at present living in a nursing home. They claim to be victims of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. They are represented by Kalbfleisch, Van der Blom & Fritz, a law firm in Haarlem, the Netherlands.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

Facts as submitted by the authors

2.1 In the Netherlands, the Algemene Wet Bijzondere Ziektekosten (AWBZ) provides a compulsory, nation-wide insurance for the costs of long-term medical care. The AWBZ is being funded out of contributions which are being levied by the State's tax department. Further, a contribution can be imposed on persons benefitting from the AWBZ, on the basis of article 6(2) of the law.

2.2 The own contributions are being implemented according to the "Own Contribution Scheme" laid down in a government decree of 1 May 1987, as amended on 21 December 1988. Income-related contributions are being levied from single persons (that is, persons who are not married or do not cohabit with a partner) and from married persons or persons who cohabit when both partners benefit from the AWBZ. The maximum income-related contribution is Fl. 1,350 for a single person or for a married or cohabiting couple. The non-income-related contribution amounts to Fl. 180 a month, and is being levied only from those patients who do not pay an income-related contribution.

2.3 On 1 July 1989, the authors, who are single, were levied for an own contribution of Fl. 978, Fl. 1,210 and Fl. 745, respectively, for their stay in a nursing home in Zandvoort. They appealed to the Board of Appeal (Raad van Beroep) in Haarlem, arguing that the distinction between married persons and persons who cohabit on the one hand and single persons on the other hand constituted discrimination in violation of article 26 of the Covenant. By decision of 14 January 1991, the Board of Appeal allowed their appeal, finding that the distinction between married or cohabiting persons and single persons, while not discriminatory per se, was not justified in the specific circumstances and amounted to a discrimination of single persons. The Board noted that the distinction had been made on the basis of budgetary, administrative and social grounds. The social considerations were aimed at the continuation of the communal household, in case one partner is admitted into care and another is left behind. The Board found, however, that this consideration did not justify the exemption of married or cohabiting persons from all income-related contributions, and that the specific circumstances of couples could be taken into account when determining the income-related contribution.

2.4 The Ziekenfonds Spaarneland, the regional executive body for the levy of income-related contributions, appealed the Board's decision to the Central Board of Appeal (Centrale Raad van Beroep), which, by judgement of 1 October 1992, quashed the decision by the Board of Appeal and rejected the authors' claim. It considered that the distinction was justified on the basis that costs saved by a married or cohabiting person, when a household is continued, are minimal, whereas costs saved by a single person, whose household is discontinued, are substantial. It concluded that the AWBZ's own contribution scheme was based on reasonable and objective criteria and therefore did not constitute a discrimination within the meaning of article 26 of the Covenant.

2.5 The authors state that no further appeal is possible against the decision of the Central Board of Appeal.

The complaint

3.1 The authors claim that they are victims of discrimination because they have to pay an income-related contribution towards the costs of hospitalization, whereas married persons or persons who cohabit and of whom the partner is not also hospitalized only pay a minimal non-income-related contribution. They argue that the distinction is not based on reasonable and objective criteria. They claim that the heart of the matter, justifying a contribution, is whether the person concerned still continues his own household, rather than whether he is married, cohabits or is single. However, under the law and regulations currently in force in the Netherlands, an income-related contribution is imposed on single persons after six months, whether they have discontinued their household or not. It is submitted that the choice either to continue or to discontinue their own household has been taken away from them, due to the precarious financial situation they find themselves in. The authors claim that this may have a demoralizing effect on the patient and reinforce the illness, and claim moreover that it entails the break-off of many social contacts since it precludes them from using their own household temporarily, for instance during weekends. Furthermore, after recovery, they cannot go back to their own household and would have to start all over again. They state that even for a married or cohabiting couple, of which both partners are in a nursing home, who pay the income-related contribution, it is generally possible to keep their own household, because the maximum contribution to be paid by the couple is the same as the maximum contribution to be paid by a single person, thereby leaving the couple financial room to continue their household if they so wish. The authors state that a solution could be found by raising the non-income-related contribution for everybody, and making the income-related contribution dependent upon the factual circumstances of each person, regardless of their marital status.

3.2 The authors further argue that, since the AWBZ is a national obligatory insurance, to which all Dutch nationals contribute, the requirement to pay an own contribution if one is entitled to insurance benefits, is in violation of the principle of equality of all insured.

Issues and proceedings before the Committee

4.1 At its 56th session, the Human Rights Committee considered the admissibility of the communication

4.2 The Committee noted that the State party, by submission of 22 November 1995, had informed the Committee that the authors exhausted the national remedies and that it did not contest the admissibility of the communication.

4.3 The Committee considered that no obstacles to admissibility existed and that the issues raised by the communication should be considered on its merits.

5. The Human Rights Committee therefore decided that the communication was admissible.

State party's observations on the merits and the authors' comments thereon

6.1 By submission of 6 November 1996, the State party recalls the factual basis of the communication as well as the authors' claims. It recalls that individual contributions for residential care are payable if the care provided by an

institution is combined with 24-hour residence. The relevant rules provide:
- during the first six months of residence everyone over 18 years of age is required to pay a non-income-related contribution of NLG 210. Where married or cohabiting partners are both required to pay this non-income-related contribution, each pays half of the said sum;
- after the first six months, everyone over 18 years of age, and depending on the marital status and the personal circumstances, is required to pay a contribution. For single persons under the age of 65 the contribution is up to NLG 1,350, and for those over the age of 65 it is up to NLG 2,200. Married or cohabiting persons under 65 years of age, if both partners are residing in an institution, pay an income related contribution of up to NLG 1,350 (per couple). If only one of the partners reside in the institution, he or she continues to pay the non-income related contribution of NLG 210. If the married or cohabiting persons are over the age of 65, the respective amounts are NLG 2,200 and NLG 210.

6.2 The State party explains that to calculate the income-related contribution, the total income is first calculated, after which deductions are made for specific expenses. The payable contribution is calculated on the resulting amount. If it is considered likely that the insured person's residence will be temporary, and that he may be returning to the community, deductions are allowed for the retention of an independent household.

6.3 The State party explains that the AWBZ is a national insurance scheme covering serious medical risks, such as unusually high or long-term medical expenses. It argues that it is necessary to complement the insurance with a system of personal contributions, since otherwise the scheme would not be affordable. According to the State party, the contributions system is based on the notion that whenever a person is taken into residential care, some money is saved in household expenses. The State party submits that each individual's ability to pay as well as domestic circumstances are taken into account, but that the determining factor is whether the period of residence should be regarded as temporary or permanent and whether the person concerned may be reasonably expected to return to the community.

6.4 According to the State party, a single person who likely will remain in residential care must be deemed incapable of maintaining a household of his own and is therefore saving the expenses of such a household. The same is said to apply to couples of which both partners are residing permanently in residential care. On the other hand, the State party claims, a married or cohabiting couple of which only one partner is in residential care, is saving very little in household expenses - only the food and care, which is reflected in the NLG 210 contribution. When both partners of a couple are in residential care, each is liable for part of the contribution (half in case of a non-income related contribution, proportional to income in case of an income-related contribution). Their contribution is calculated taking the total income of the couple into account.

6.5 The State party explains that the present system reflects the Directive adopted by the Council of European Communities on 19 December 1978, concerning the progressive implementation of the equal treatment for men and women in matters of social security. Before the present system came into effect, with respect to married couples, only the husband was required to pay a personal contribution. When the system was adjusted, resulting in the present one, the

Government applied the principle that the adjustment should have no financial consequences, either for the AWBZ or for those insured, and in particular for married couples, in order to avoid that they would suddenly have to pay double the contribution than before, while their income remained the same.

6.6 As regards the authors' claim that the contribution scheme is in violation of the principle of equal treatment of all insured, the State party observes that the scheme does not result in unequal treatment of equal cases. According to the State party, there is an essential difference between those who still have, or are expected to have, a household and those who do not.

6.7 The State party concludes that the distinction made in the personal contribution scheme under the AWBZ is based on the fact whether or not the person concerned has, or is assumed to have, an independent household. If the household is continued, only a limited amount of money is saved, whereas if the household is relinquished, all the costs of accommodation, care and food, is in principle saved, justifying a higher personal contribution. The State party argues therefore that the distinction made is not based on any personal feature of the person concerned, but on reasonable and objective grounds. According to the State party, it does not constitute a violation of article 26 of the Covenant.

7.1 In his comments on the State party's submission, counsel notes that all residents of the Netherlands are compulsory insured against special medical costs under the AWBZ. The contributions to the scheme are collected by the tax authorities and are intended to cover also the costs of admission to a nursing home or clinic. According to counsel, in practical terms the obligation to contribute is the same for single persons and married/unmarried couples. Since a distinction is made, however, between single persons and couples once they claim reimbursement under the AWBZ insurance, in the sense that different deductible amounts apply, the authors argue that the distinction is discriminatory under article 26 of the Covenant.

7.2 Counsel refers to the different maximum amounts paid, and in particular to the amount for persons over the age of 65, and concludes that it seems that these amounts reflect not only the saving on subsistence, but also a contribution towards the costs of care, treatment and rehabilitation. From an insurance perspective, according to counsel, this amounts to inequality and constitutes discrimination based on status without reasonable and objective justification.

7.3 Counsel submits that although in individual cases, on the basis of a prognosis made by the attending therapist or physician, a single person may be considered likely to go home eventually, an thus be eligible to a reduction in the payable amount, the situation of inequality remains because this is fully dependent on the prognosis made, whereas medical prognoses are irrelevant for married couples. Counsel reiterates that single persons who are required to pay an income-related contribution after six months are in practice denied the choice of continuing to keep an independent household.

7.4 In this context, counsel refers to the difference in payment between a single person who makes an income-related contribution and the case where both partners of a couple are admitted and jointly required to pay the maximum amount of only one of them.

7.5 Counsel concludes that the rules governing the personal contributions under AWBZ insurance, with single persons being charged with an income-related contribution and married persons whose partner is not admitted with a contribution not-related to income, and with only one income-related contribution if they are both admitted, must be deemed to violate article 26 of the Covenant.

Issues and proceedings before the Committee

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The question before the Committee is whether the principle of equality as laid down in article 26 has been violated (a) because the authors are required to make personal contributions under the AWBZ because they are in residential care, whereas insured persons who are not in residential care are not required to make personal contributions; and because the calculation of the personal contributions puts the authors at a disadvantage, since (b) they are required to pay income-related contributions whereas married or cohabiting persons whose partner is not in care, only pay a fixed non-income related contribution, regardless of their income, and (c) couples where both partners are in care, pay the same maximum amount as a single person.

8.3 The Committee is of the opinion that the requirement that individuals, when benefiting from the AWBZ insurance scheme, pay a personal contribution towards the costs of residential care, is as such not in violation of the principle of equality before the law. With regard to the issue under (a), the State party has explained that those using the system have to contribute to the scheme lest this become not affordable. The Committee considers that the explanation given by the State party justifies the distinction between those who are required to pay personal contributions and those who are not required to do so, and the distinction thus does not constitute a violation of article 26 of the Covenant.

8.4 Personal contributions under the AWBZ should however be calculated objectively and without arbitrariness. In relation to the issue under (b), the Committee has taken note of the State party's explanation that the distinction in the contribution is based upon the factual difference that married or cohabitating persons leave behind a partner who continues to live in what was their common household and therefore does not save the same amount of money as does a single person in residential care. For this reason they are requested to pay a fixed contribution. The Committee considers that this distinction, based on a presumption that has its basis in the factual circumstances of life of persons benefiting from the scheme, is objective and reasonable. Therefore it does not constitute a violation of article 26 of the Covenant. This conclusion is not affected by the argument of the authors that the State party might have at its disposal alternative methods of levying sufficient funding for the AWBZ scheme.

8.5 With regard to the issue under (c), the Committee notes that the State party has explained that in calculating the amount of money each person must pay as an income-related contribution, it takes into account each individual's ability to pay as well as domestic circumstances. In case of a couple where both spouses are in care, their total income forms the basis of the calculation of their contribution. This, however, does not affect the ceiling of the own contribution which is the same (NLG 1,350) for single persons and couples alike. None of the authors was levied for an own contribution that would amount to this ceiling. Consequently, the authors have failed to show that they are victims of a violation of article 26 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Q. Communication No. 672/1995, C. Smart v. Trinidad and Tobago*
(adopted on 29 July 1998, sixty-third session)

Submitted by:	Clive Smart (represented by Mr. Clive Woolf of the London law firm S. Rutter and Co.)
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	11 December 1995 (initial submission)
Date of admissibility decision:	5 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1998,

Having concluded its consideration of communication No.672/1995 submitted to the Human Rights Committee by Clive Smart, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Clive Smart, a Trinidadian citizen and carpenter who is awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. The author claims to be a victim of a violation by Trinidad and Tobago of articles 7; 9, paragraph 3; 10, paragraph 1 and 14, paragraphs 1 and 3, of the International Covenant on Civil and Political Rights. He is represented by Mr. Clive Woolf of the London law firm S. Rutter and Co.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts as submitted by the author

2.1 On 22 June 1988, the author was arrested for the murder of one Josephine Henry. He was found guilty as charged in the Scarborough Assizes Court on 14 February 1992, and sentenced to death. His appeal was dismissed by the Court of Appeal of Trinidad and Tobago on 26 October 1994. On 11 December 1995, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal.

2.2 On trial, the prosecution's case was based on the author's evidence, who did not dispute the attack, and that of several witnesses. The author, in an apparent fit of jealousy, had attacked Josephine Henry, stabbing her 19 times.

2.3 The victim's sister, Charmaine Henry, testified that, on 22 June 1988, at 10:00 she had sent the author out of her house and told him to stay away. She claimed that some time later, she had heard loud calls of distress from her sister. She followed the cries and saw her sister struggling with the author, who was stabbing her. She stressed that her sister had been unarmed. She had implored the author to stop, ran down the road calling for help, then returned to the scene.

2.4 Another prosecution witness Hayden Griffith, testified that he had seen the author, whom he did not know, pass by his house gesticulating; he could not see who was with him. He had then seen the victim go past his window. A third witness, Michelle Quashie, at whose house the victim had been, testified that Ms. Henry had left the house and gone outside to talk to the author.

2.5 A further witness, Elizabeth Baird, who was a neighbour of Charmaine Henry, testified that she had overheard the conversation between the author and Charmaine Henry following which she had heard her calling out to her sister for help. She had seen the author stabbing her in the road; she had shouted to him to stop. Josephine Henry had fallen into the ditch, where the author had continued to stab her, despite her pleas that he stop. She claims that the victim had been unarmed.

2.6 The arresting officer gave evidence that when the author had seen him he said " Mr. Joefield I coming with all yut, I am not running". The author was cautioned and taken to the police station. Later the author accompanied various officers to retrieve the bloodstained knife, which was stuck in a mango tree, where the author said he had tried to commit suicide. The stains were of the same blood group as Josephine Henry.

2.7 The author invoked self defence and, subsidiarily, provocation. He gave evidence from the witness stand and testified that he and the victim had had a relationship, that he gave her money every week, and that they were to be married. On 21 June 1988, he had given her $ 5,000 dollars he had won gambling, and she had promised to cook him dinner at his house that evening. When he returned home she had not been there. The author states that Josephine also failed to appear at court the following morning with the money as arranged, since he was expecting a fine for gambling. He went to look for her, first at her father's house where her sister Charmaine told him she was not there, then, at Michelle Quashie's, where he found her. He states that Josephine had come out of the house carrying a cutlass knife, with which she had been peeling a pineapple. The author testified that she told him that she had spent the money on tickets for a holiday for herself and three friends. He told her not to joke and to give him the money, so he could pay his fine and a debt he had with his foreman. He testified that she had abused him by saying: "is stupid $ 5,000 you getting on so for, my body worth more than that". She then had cut his hand and a struggle ensued, during which he took the knife from her and started to "fire stabs", the next thing he knew was that the victim was in the canal covered with blood. He ran away taking his jumper and shoes of climbing up a mango tree and trying to hang himself. He went off to his grandmother's where the arresting officer found him. He claims he told the police he had been cut. During cross examination, he admitted he had not told the arresting officer that he had been cut.

The complaint

3.1 Counsel submits that the author is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant, since he has been on death row for over four years and six months. It is argued that the delay in carrying out the execution is unconstitutional. In support of his argument, counsel refers to the judgment of the Judicial Committee of the Privy Council in Pratt and Morgan[1], and to a judgment of the European Court of Human Rights.[2] Counsel further alleges that the anguish the author suffered during his pre-trial detention, facing the prospect of his execution, should he be convicted, should be relevant in adjudging whether the author has been a victim of inhuman and degrading treatment, in violation of the Covenant.

3.2 The author claims that his prologued pre-trial detention violated articles 9, paragraph 3, and 14 paragraph 3 (c), of the Covenant. In this respect he states that he was arrested on 22 June 1988 but that his trial only took place on 7 February 1992. This is said to be particularly unjustifiable in a case where there were no great difficulties in obtaining the attendance of witnesses, testimonies or evidence. Counsel argues that 44 months in pre-trial detention is incompatible with the Covenant; reference is made to the Committee's jurisprudence.[3] Counsel contends that the delay following the trial is equally attributable to the State party; reference is made to the Privy Council's Judgment in Pratt and Morgan.

3.3 The author claims that his trail was unfair. Counsel argues that the trial judge violated his obligation of impartiality by the way in which, during his summing-up, he dealt with the issues of self-defence and provocation. Counsel further claims that the judge gave an inaccurate account and misdirected the jury on the effect of the evidence adduced by the prosecution with regard to the issue of self-defence. He claims that the judge misdirected the jury by imposing an objective, as opposed to a subjective, test for self-defence. Finally, he claims that the judge did not give proper directions on the test of a reasonable man in provocation, thereby denying the author the possibility of being acquitted or convicted of the lesser charge of manslaughter. Moreover, counsel submits that the author has been denied a fair trial in that the trial judge should have discharged one of the members of the jury, who it is alleged was related to the victim.[4] It transpires, however, that this issue was not raised either on trial nor on appeal.

3.4 With regard to the appeal, the author claims that counsel who represented him before the Court of Appeal failed to properly consult with him, because she did not pursue two of the grounds of appeal prepared by a different Counsel, not giving the author any explanations, and denying him the possibility of clarifying the matter.

3.5 Finally, the author invokes a violation of article 6, paragraph 2, of the Covenant, because he was sentenced to death without the requirements of a fair trial having been met.

State party's observations and Counsel's comments thereon

4.1 By submission of 5 March 1996, the State party informed the Committee that it would submit its comments on the admissibility of the case by 18 March 1996. In a further submission dated 19 March 1996, the State party does not address the admissibility of the communication but, rather, informs the Committee that, to avoid further delays in the case of Mr. Smart, the State party would stay the author's execution for a period of two months only.

4.2 The State party submits as follows:

> ".. 1. The Government of Trinidad and Tobago is committed to upholding the rule of law and it would therefore not deny Mr. Smart access to the United Nations Human Rights Committee for the determination of his petition provided that the process is not abused by the condemned prisoner.
>
> 2. The Government however has a responsibility to ensure that these petitions are determined quickly so as not to frustrate the application of the law. Any delay or procrastination by the United Nations Human Rights Committee can have the effect of subverting the sentence of the Court and Constitution of Trinidad and Tobago.
>
> 3. The Government therefore requests the petition of Smart be heard and determined within two months of the Government of Trinidad and Tobago submitting its response to the application before the said Committee.
>
> 4. During the two month period, the Government will not carry out the death sentence. ..."

4.2 On 2 April 1996 the Committee, through its Chairman replied to the State party by letter, reminding it that it had been the State party's own failure to submit comments on the admissibility within the imparted deadline that had caused the delay in deciding on the case. The letter noted that the State party's Note Verbale of 19 March 1996 did not contain any information relating to the admissibility of the case. It further stated that the Committee intended to take up the communication during its 57th Session.

4.3 In a further submission dated 20 May 1996 the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. It submits that the rights which the author invokes in his communication are coterminous with rights protected by the Trinidadian Constitution and refers to sections 4, 5 and 14 of the Constitution and that it is for the author to seek redress in the High Court. The State party further notes that the Legal Aid and Advisory Authority has not received an application for legal aid from Mr. Smart for a constitutional motion.

5.1 In his comments, dated 14 and 19 June 1996, counsel refutes the State party's contention that the author can still pursue a constitutional motion, because the courts of Trinidad and Tobago and the Privy Council have ruled that: " [a] person's constitutional rights are not infringed if that person has a trial at which the trial judge possesses the common law rights to prevent an abuse of process". The courts have further held that once there has been a trial with a Judge and jury any person convicted can only take constitutional points relating to the fairness and conduct of the trial in criminal appeals against conviction[5]. In line with this jurisprudence, the author has exhausted his right of appeal against conviction.

5.2 In respect of the State party's contention that legal aid is made available and that the author simply chose not to request it, counsel confirms that the author did not request legal aid but argues that this was because of the perceived futility of requesting something that has never, to counsel's knowledge, been granted to anyone imprisoned who complained of similar infringements. Counsel claims that the State party does not say that a request for legal aid for a constitutional motion would be successful but simply that it is available. Counsel explains that the legal aid procedure is long and bureaucratic, and recalls that the Judicial Committee has ruled that there must be a period of at least four days between the reading of a warrant of execution and the scheduled date of execution.[6] Such a delay is activated by the reading of the warrant of execution, after an unreasonable delay between the time of conviction and that of the reading of the warrant. Counsel alleges that given the Trinidadian scheme of legal aid, it is not possible to submit an application in time once a warrant has been read. Counsel alleges that for practical purposes, legal aid to a death row inmate, such as the author, is not available in Trinidad and Tobago; thus, constitutional redress remains a hypothetical remedy.

The Committee's admissibility decision

6.1 During its 57th session, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, the Committee took note of the State party's arguments that a constitutional remedy was still open to the author. However the Committee also noted counsel's counter-argument that legal aid has never been made available for this purpose and in this respect the Committee recalled its constant jurisprudence that for purposes of the Optional Protocol, domestic remedies must be both effective and available. The mere affirmation by the State party that a remedy exists is not sufficient for the Committee to consider it an effective remedy which needs to be exhausted for the purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

6.2 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee referred to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 the Covenant, in the absence of some further compelling circumstances.[7] The Committee observed that the author has not shown in what particular ways he was so treated as to raise an issue under articles 7 and 10 of the Covenant. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.3 As to the claim of undue prolongation in the judicial proceedings in violation of article 14, paragraph 5, of the Covenant, the Committee noted that, on the basis of all the information before it, it was clear that such delays in the appeal proceedings as occurred were essentially attributable to the author. In this respect the Committee noted the contents of an addendum in the Court of Appeal Judgement which stated that: "This appeal has been called up since 1st February of this year. Thereafter it was called up on five further occasions, stretching from then into the month of July. On each occasion the appellant was responsible for the delay since he had been constantly writing letters to the Registrar whenever the matter had been called up to say that his family had been busy seeking to retain private attorney. It was only when this Court decided to act and to appoint attorney by way of legal aid that the appellant, for the first time, retained private attorney. This he did in October of this year. It was clear to us all that the appellant was attempting by this manoeuvre to beat the Pratt and Morgan deadline as best he could". The Committee concluded that in this respect the author had failed to advance a claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

6.4 The Committee considered that the author and his counsel had sufficiently substantiated, for the purposes of admissibility, that the delay of forty four months in bringing the author to trial and his continued detention throughout this period may raise issues under articles 9, paragraph 3 and 14, paragraph 3 (c), of the Covenant, which should be examined on the merits.

6.5 As to the author's allegation that he was inadequately represented during his appeal hearing, the Committee considered that the claim could raise issues under article 14, paragraph 3 (b), of the Covenant.

6.6 With regard to the rest of the author's claims, the Committee noted that these related primarily to the conduct of the trial by the judge and his summing-up to the jury. It recalled that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript do not reveal that the conduct of his trial suffered from such defects. In particular, it is not apparent that the judge should have dismissed a juror, who it was alleged was a member of the deceased family, and by not doing so had violated his obligation of impartiality. In this respect the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication was declared inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.7 On 5 July 1996, the Committee declared the case admissible with regard to article 9, paragraph 3, and article 14, paragraph 3 (c),(in respect of the claim of excessive delays in bringing him to trial) and with regard to the claim of inadequate representation on appeal under article 14, paragraph 3 (b) and consequently of article 6 of the Covenant.

State party's observations on the merits and counsel's comments

7.1 By submission of 13 January 1997, the State party denies that there has been any violation of the Covenant, in the author's case.

7.2 As to the allegations concerning the delays in hearing the author's case the State party contends that a delay of 18 months between indictment and trial with a preliminary inquiring within the first three months cannot be construed to be unreasonable. In relation with this first delay it also contends that it was not unreasonable, since the Office of the DPP was suffering an acute shortage of professional staff to handle the continually rising case load. With respect to the delay between the indictment and the trial itself the State party contends that the trial first came up for a hearing on 9 April 1990 and was adjourned nine times. On all but one occasion the prosecution was ready to proceed. The eight applications for adjournments were made by the defence and the court granted them. The trial commenced on 2 February 1992, it was completed by 14 February, within twelve days. The State party contends that the delays were of the author's own making, since only one adjournment was requested by the prosecution and that was the result of industrial action in the legal department at the time of the hearing.

7.3 Concerning the allegations of inadequate representation on appeal, in breach of article 14, paragraph 3 (b), in that counsel in Trinidad and Tobago, on appeal did not submitted two of the grounds of appeal put forward by the author's counsel in London, the State party contends that there is no merit to this allegation. It submitted an affidavit from the author's counsel in Trinidad and Tobago, Ms Paula Mae Weeks' where she states: " From the outset Mr Smart instructed me to forward the documents related to his appeal to English solicitors, Ingledew, Brown, Bennission [...] I did so and later received from them draft Grounds of Appeal. Further, at the point at which I entered the matter Alice Yorke-Soohon Attorney-at-law had already twice filed Grounds of Appeal in the matter. I reviewed all the grounds and adopted and incorporated those with which the law and I were in agreement. I did not explain this decision to Mr. Smart since these were matters exclusively with the purview of an Attorney-at-law. Mr Smart could make no useful input in respect of such matters". She further added: " I am of the firm belief that every viable ground of appeal that could have been advanced on Mr. Smart's behalf was ventilated adequately before the Court of Appeal".

8.1 In comments, dated 17 March and 4 June 1997 counsel submits that it is inadmissible for the State party to try and justify its failure to comply with its Covenant obligations by reference to administrative problems, if these exist and delays occur these should be limited to those cases where persons are not detained in custody before trial. With respect to the adjournments requested by the defence, the author states that the Supreme Court (High Court) in Tobago sits for only one month each year, as a consequence substantial delays are caused. The adjournments requested on behalf of the author took place in two months but because of the sitting arrangements made by the State party for the Supreme Court in Tobago, these adjournments were spread over a period of two years. It appears that the adjournments were requested to enable the author to be represented by Mrs Yorke at trial. Counsel states that the author cannot be held responsible for the sitting arrangements made by the State party in Tobago.

8.2 On the claims under article 14, paragraph 3 (b), counsel reiterates his claim that counsel in Trinidad acted against the author's wishes by not following the instructions of counsel in London, and if she had wanted authority to drop grounds of appeal she should have consulted with Clive Smart. The author states that at the time he met with Ms Weekes nothing about the case was discussed only the payment of fees.

9.1 In a further submission, dated 26 August 1997, the State party through its London solicitors, states that the delays admitted to by the State party are admitted as a matter of fact and not as a concession in the legal sense. It reiterates that these were not unreasonable and that the majority of adjournments were attributable to the author, either because the defence was not ready or due to unavailability of counsel.

9.2 It further submits that the State party is unable to respond to the author's superficial complaints that counsel may not have followed instructions, that it should have been plain to the author whether his instructions were followed or not. It further notes that the English solicitors are referring to matters which were taking place in Trinidad, Port of Spain and in respect of which they have no direct knowledge, information or instructions.

Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

10.2 The State party has conceded that a period of over two years elapsed between the author's arrest on 22 June 1988 and the date set down for the beginning of the trial in September 1990. This delay in itself constitutes a violation both of article 9, paragraph 3, and of article 14, paragraph 3 (c). In these circumstances the Committee need not decide whether the further delays in the conduct of the trial, are attributable to the State party or not.

10.3 The author has alleged a violation of article 14, paragraph 3 (b), in that counsel did not follow his instructions in respect of the grounds of appeal to be put to the court. This is said to have denied him adequate representation on appeal as envisaged under the Covenant. The Committee notes that it is not apparent from the material before it that counsel's decision to drop two grounds of appeal was a function of anything else but her professional judgement. There is no evidence that counsel's behaviour was arbitrary or incompatible with the interests of justice. In the circumstances, there has been no violation of article 14, paragraph 3 (b), of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Smart with an effective remedy, including commutation and compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken in connection with the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] Pratt and Morgan v. Attorney General of Jamaica et al. (1993), (Privy Council) Appeal No. 10 of 1993, Judgement delivered on 2 November 1993.

[2] Soering v. United Kingdom (1989), 11 EHRR 439.

[3] Communication No. 6/1977 (Sequeira v. Uruguay), Views adopted on 29 July 1980, and Communication No. 203/1986 (Muñoz Hermoza v. Peru), Views adopted 4 November 1988.

[4] From the trial transcript, it appears that two of the jurors who were selected disqualified themselves, because they knew the accused, five of those called had known the accused and family of the deceased.

[5] See Chokolingo v. Attorney General Of Trinidad and Tobago 1981 1 WLR 106.

[6] See Guerra v. Baptiste [1995] 3 WLR 891.

[7] See Committee's Views on communication Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v.Jamaica), adopted on 30 March 1992; Communication No. 541/1993 (Errol Simms v. Jamaica), declared inadmissible on 3 April 1995.

[8] Ms. Weeks currently sits on the High Court of Trinidad and Tobago.

R. Communication No. 676/1996, A. S. Yasseen and N. Thomas v. Guyana* (adopted on 30 March 1998, sixty-second session)

Submitted by:	Abdool Saleem Yasseen and Noel Thomas (represented by Interights, London)
Victim:	The authors
State party:	Republic of Guyana
Date of communication:	2 February 1996 (initial submission)
Date of decision on admissibility:	11 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 1998,

Having concluded its consideration of communication No.676/1996 submitted to the Human Rights Committee by Messrs. Abdool Saleem Yasseen and Noel Thomas, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Abdool Saleem Yasseen and Noel Thomas, two Guyanese citizens awaiting execution at the Centre Prisons, Georgetown, Guyana. They claim to be victims of violations by Guyana of articles 6, paragraphs 1 and 4; 7; 10, paragraphs 1 and 2; and 14, paragraphs 1 and 3 (a) to (e) and (g), of the International Covenant on Civil and Political Rights. They are represented by Interights, a London-based organization.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville. Ms. Christine Chanet, Mr. Omran el Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. An individual opinion by Committee member Nisuke Ando is attached.

The facts as submitted by the authors

2.1 On 30 March 1987, the authors were indicted for the murder of one Kaleem Yasseen, half-brother of one of the authors. They were found guilty as charged in the Essequibe High Court and sentenced to death on 2 June 1988. On 25 October 1990, the Court of Appeal ordered a re-trial. The re-trial was aborted and a third trial was held in September 1992. The authors were once again convicted as charged and sentenced to death on 6 December 1992. Their second appeal against conviction and sentence was dismissed in June 1994. On 5 July 1994, the authors applied to the President to invoke the prerogative of mercy. On 1 February 1996 a warrant of execution was read to them. A stay of execution was granted, pending their appeal to the High Court.

2.2 On 20 March 1987, Saleem Yasseen gave an oral statement to the police at Suddie police station. He claimed to have been out of town during the killing and had returned upon hearing about it. On 21 March 1987, Noel Thomas gave an oral statement to the police, the contents of which are unknown. He was placed in a police lock-up without food, water or toilet facilities, and was not permitted visitors.

2.3 On 24 March Yasseen was arrested. Both authors were then brought before a magistrate and place on remand at the Central Prisons: they were not separated from convicted prisoners. Prison conditions were appalling. The authors were placed in a cell measuring 80 feet by 30 feet with about 150 other prisoners. There was only one electric light and one functioning toilet. Prisoners were only allowed to use the single bathroom once a day. The drainage was defective, forcing the authors to bath in six inches of dirty water. They had to sleep on the floor, due to lack of mattresses. No recreation facilities were available. They were only allowed one visit a month from relatives.

2.4 At the preliminary inquiry, the police produced a written statement, alleged to be a confession made by Noel Thomas. Mr. Thomas asserts that the confession was illegally obtained; he was physically abused by the police, who used pliers on his genitals. The officer who had received his confession, Superintendent Marks, did not testify during the preliminary hearing. Superintenden Barren produced his pocket book, in which he claimed to have recorded an oral confession by Yasseen. This pocket book, along with Superintendent Marks', and the Suddie station diary for the days between 21 to 26 March 1987 have since disappeared. The station diary is kept in a store room under lock and key. All three documents were produced at the first trial but disappeared shortly thereafter.

2.5 On 26 July 1987, the authors were taken to Suddie Magistrate Court, by public transport. The journey took at least eight hours and they were handcuffed in full view of the public. This was repeated some 10 times during the preliminary enquiry, which lasted from 27 July 1987 to 29 February 1988.

2.6 The first trial took place in May 1988. During the trial the authors were kept in solitary confinement at the Suddie Police station, in a 8 by 14 feet cell, with no toilet, mattress or light and one single air vent. The authors were returned to Central Prison upon conviction and placed in solitary confinement on "death row", where they remained during the period of their appeal. They were kept in cells measuring seven by seven feet and eight feet high, with no lights or toilet nor washing or recreation facilities.

2.7 In March 1990, the authors apealed. The hearings lasted some three months; the decision was reserved until 25 October 1990. The appeal was allowed on that date and a re-trial ordered, because of improper selection of the jury and the fact that superintendent Marks was permitted to testify at the trial and at the voir dire, although he had not appeared at the preliminary inquiry (despite having been available). In November 1990, Yasseen was placed in a cell with two other convicted men. In January 1991 when he was diagnosed as being mentally unsound, he was placed in a cell by himself, until April 1991, when he was transferred to the infirmary. Yasseen never saw a doctor, and his request to see the prison director remained unheeded.

2.8 In May-June of 1991 the re-trial was held. It was aborted after two weeks, on grounds of jury tampering. During the trial, the authors were held at the Suddie police station, under the conditions already described. After the trial, they were returned to Central Prison. Mr. Yasseen was placed in the infirmary until September 1992, because of a broken leg, the result of an injury in prison. In the infirmary he was placed in a semi-dormitory called "itchy park". Together with eight people with contagious diseases.

2.9 The third trial began in October 1992. On 6 December 1992, the authors were found guilty as charged and sentenced to death. Mr. Yasseen's lawyer was unable to attend the first four days of the trial and accordingly requested an extension. This was denied to him, effectively leaving the author with no legal representation.

2.10 The prosecution's case was based on the authors' alleged confession statements. One witness who had been arrested on 25 March 1987 and had made a statement to the police concerning the case was called to testify, but failed to do so; this witness had appeared at the first trial. The station diary and police notebooks, which were produced at the first trial, were not produced in the third trial. The authors believe these would have shown that Mr. Yasseen had not been under arrest at the time of his alleged oral confession. Two medically trained personnel from Central Prison testified that Mr. Thomas had been physically abused in police custody. After the trial, the authors learned that the jury foreman was the deceased wife's uncle. They were returned to Central Prison and kept on death row under the conditions already described. The crutches Mr. Yasseen used for his broken leg were taken away from him, thus forcing him to crawl.

2.11 On Thursday 1 February 1996 at 3:00 p.m., warrants were read to the authors for their execution at 8:00 a.m. on Monday 5 February 1996. The normal practice is for warrants to be read on a Thursday for the execution to take place the following Tuesday. The authors' families were informed of the execution through an anonymous telephone call at 10:00 p.m. on Thursday 1 February.

2.12 On Saturday 3 February 1996, an application for a stay of execution was heard, and a Conservatory order was requested to allow a hearing to take place. The Conservatory order was denied, but an appeal against this judgment to the full Court of Appeal, was allowed. A seven day stay of execution was granted. On 7 February, the authors were informed that the Court of Appeal's hearing on the merits of their case was scheduled for 8 February.

2.13 Counsel notes that no recourse to the Privy Council is permitted in Guyana; therefore, the authors are said to have exhausted domestic remedies. They assert that the litispendence of the Conservatory motion should not be held to mean that domestic remedies have not been exhausted, for two reasons. Firstly, because the authors consider it highly unlikely that the motion will succeed. Secondly, since, given the nature of the situation, the authors will be pursuing all legal procedures until the very last minute, they cannot be expected to wait until their final claim has been heard before petitioning the Human Rights Committee; this would require them to wait until a moment dangerously close to their execution before invoking their rights under the International Covenant on Civil and Political Rights, or force them to refrain from taking all possible courses of action in the domestic courts.

The complaint

3.1 Counsel submits that the authors were denied the right to a fair trial, in violation of article 14 of the Covenant. It is alleged that the authors were convicted on scant evidence, and while recognizing that the Human Rights Committee does not normally evaluate facts and evidence, it is submitted that in the instant case, the evidence was so weak that the execution of a death sentence on the basis of such weak evidence would be tantamount to a gross miscarriage of justice. Counsel notes that the authors were convicted on the basis of their own alleged confessions, which in Mr. Thomas' case was extracted from him by physical force and, in Mr. Yasseen's case, was an oral confession which he denies ever having made. Furthermore, the authors submit that they were denied a trial by an impartial tribunal, because it was later discovered that the foreman of the jury during the last trial, was the uncle of the deceased's wife.

3.2 The authors claim a violation of article 14, paragraph 3(c), in that they were not tried without undue delay. In this respect, it is submitted that the authors have been in detention for over ten years since they were charged with murder in March 1987.

3.3 Counsel submits that the authors' right to examine witnesses and call evidence was not guaranteed because one witness, Hiram Narine, did not appear, in spite of numerous summons and because the missing police notebooks and diary could have contained exculpatory evidence; this is said to be a violation of article 14, paragraph 3 (e), of the Covenant.

3.4 The authors claim a violation of article 14, paragraph 3 (g), in that they were forced to confess guilt. In Mr. Thomas' case, physical force was used against him to obtain his confession; in Mr. Yasseen's case, it was wrongly argued that he had made an oral confession.

3.5 Counsel submits that Mr. Thomas was not promptly informed of the charges against him, in violation of article 14, paragraph 3 (a), since he was arrested on 20 March 1987, that is four days after his arrest. With respect to Mr. Yasseen, it is submitted that he has been the victim of a violation of article 14, paragraph 3 (b) and (d), as his lawyer was unable to attend the first four days of the last trial, despite an adjournment having been requested, thus leaving the author without legal representation.

3.6 The authors claim a violation of articles 7 and 10, paragraph 1, on the grounds that Mr. Thomas was subjected to physical abuse in custody, resulting in a false confession. They were taken on at least 11 separate journeys, lasting eight hours each, on public transport to attend hearings, during which they were handcuffed and fully in the public's view, thereby causing unnecessary humiliation. The conditions of their detention were poor and at various times, they were denied food, medical care and basic hygiene, visits from family and recreational facilities; Mr. Yasseen was denied access to a doctor though he had been pronounced mentally unfit and was deprived of his crutches, forcing him to crawl. Furthermore, it is alleged that the authors have been subjected to great mental anguish, due to the nine years they have lived in terrible prison conditions, during pre-trial detention and during the periods between the various trials. All this has been compounded by the lack of response to their request for mercy; they only learned of the presidential refusal to exercise the prerogative of mercy when their death warrants were read to them. Their families were not officially informed of the date of execution but received an anonymous telephone call.

3.7 Counsel submits that the authors have been the victims of a violation of article 10, paragraph 2, because on many occasions they were held together with convicted prisoners, with no exceptional circumstances justifying this situation.

3.8 The lack of any official response to the authors' request for mercy, and the failure of the authorities to follow the normal procedure in the issuance of an execution date (the authors were given one day less in which to pursue legal redress), is said to constitute a violation of article 6, paragraph 4, of the Covenant.

State party's admissibility observations and counsel's comments, and Committee's admissibility decision

4.1 On 9 February 1996, the State party argued that domestic remedies still available to the authors had not been exhausted, as their motions before the High Court could be appealed to the Court of Appeal, the State party's final judicial instance. By note of 11 April 1996, the State party requested an extension of the deadline for submission of observations on the admissibility of the communication.

4.2 On 28 February 1997, counsel informed the Committee that the Court of Appeal of Guyana had dismissed the authors' application on 14 May 1996 and that it had decided to remand the case to a new sitting of the Mercy Committee. To counsel, all available domestic remedies had been exhausted with the dismissal of the authors' application by the Court of Appeal.

4.3 During its 60th session, the Committee considered the admissibility of the communication. It regretted the lack of cooperation from the State party and rejected the State party's argument, which had been expressed in a note verbale dated 9 May 1997 addressed to the Committee, that the Committee was examining the present communication with undue delay. As to the requirement of exhaustion of domestic remedies, the Committee considered that following the dismissal of the authors' appeal by the Court of Appeal of Guyana, a further remittal of the case to the Mercy Committee did not constitute an effective remedy which the authors were required to exhaust for purposes of the Optional Protocol.

4.4 The Committee considered that the authors had adequately substantiated, for purposes of admissibility, their claims under articles 7, 9, 10 and 14 of the Covenant, which should be examined on their merits. Accordingly, on 11 July 1997, the Committee declared the communication admissible.

State party's merits observations and counsel's comments

5.1 By note verbale of 19 August 1997, the State party's Minister for Foreign Affairs expressed "disappointment and .. distress" about the Committee's admissibility decision, noting that the Committee had failed to take into consideration the Government's observations of 3 October 1996 on the authors' claims. Upon inquiry by the Committee, it transpired that the State party's submission of that date had been addressed to the Special Rapporteur for Summary and Arbitrary Executions of the UN Commission on Human Rights. The Government of Guyana was so informed on 27 August 1997. By note of 29 August 1997, the State party requested that its observations of 3 October 1996 be incorporated into the case file, and that the Committee reconvene to consider the admissibility and/or the merits of the case during the 61st session in October 1997. The Committee was apprised of these developments during its 61st session and considered that authors' counsel should be given an opportunity to comment on the State party's observations of 3 October 1996. On 11 December 1997, the State party was informed that the case had been remanded for a final decision to the Committee's 62nd session.

5.2 In its observations of 3 October 1996, the State party provides a detailed factual account of the case which differs in some points from the authors' version. It notes that Noel Thomas and others were arrested on 21 March 1987 and questioned about the murder of Kaleem Yasseen. Thomas denied any involvement in the killing and was released from custody. On 23 March, one Hiram Narine was arrested and questioned; he provided information of relevant conversations between him and Thomas, and Thomas was re-arrested on the very same day. On 24 March 1987, Abdool Yasseen was arrested and informed that he was suspected of involvement in the killing of his brother. Later on the same day, Noel Thomas was confronted with Hiram Narine, and after Narine reconfirmed what he had told the police earlier, Thomas was cautioned and observed that he had been used by Abdool Saleen; he then volunteered to give a written statement. According to the State party, Thomas agreed that Asst. Police Superintendent Marks write down the statement, and declined to have a lawyer or relative present.

5.3 Shortly after the written deposition had been made, Abdool Yasseen was confronted with a copy of the statement - he read it, confirmed the correctness of Thomas' version, and volunteered to make an oral statement. On 26 March 1987, both accused were asked, in the presence of each other, about the location of the shotgun which was used for the murder of Kaleem Yasseen. Noel Thomas allegedly made statements heavily incriminating Abdool Yasseen as the instigator of the crime. On 30 March 1987, both were charged with murder in the Suddie Magistrate's Court.

5.4 The State party notes that after each sitting of the preliminary inquiry, the accused were sent on remand to Georgetown Prisons, as Essequibo County (location of the court) does not have a prison. According to the State party, the remand section of Georgetown Prisons is not overcrowded and has both toilet and bathing facilities. It has "sufficient mattresses for sleeping purposes - although it is not denied that prisoners sometimes prefer to sleep on the floor rather than share a mattress with another prisoner." The authors' allegation that there is a six-inch build-up of dirty water caused by a defective drain is dismissed as false. The mode of travel to and from Suddie Magistrate's Court is by ferry boat, which is used by the general public including lawyers, magistrates and judges. Prisoners charged with murder are handcuffed during the four-hour journey, as a security measure.

5.5 The preliminary inquiry concluded on 29 February 1988; neither of them called any witnesses during the preliminary inquiry. The trial in the High Court began in May 1988 and concluded on 2 June 1988; the accused were found guilty as charged. During the trial, Abdool Yasseen denied having made any oral confession to Asst. Superintendent Marks, and Noel Thomas argued that the written statement had been signed under duress. Thomas further claimed that he was beaten by police officers and that pliers were applied to his genitals. The trial judge conducted a *voir dire* into these allegations and, after hearing evidence from both prosecution and defense witnesses on the voluntariness of the statement, dismissed Thomas' allegations and admitted his statement as evidence.

5.6 On 3 June 1988, the authors appealed conviction and sentence. On 25 October 1990, the appeal was allowed on the grounds that (a) a police witness who was not called during the preliminary inquiry was allowed to testify on trial without any explanation provided by the prosecution as to why he was not called as a prosecution witness then; (b) the trial judge improperly excused jurors on the insufficient ground that they feared that they might be sequestered at some stage during the trial. A re-trial was ordered. The re-trial started before a different High Court Judge in June 1991; it was aborted after an inquiry by the judge into allegations that a member of the jury had been seen in company of, and heard in conversation with, a relative of Abdool Yasseen. Two weeks had elapsed when the trial was aborted.

5.7 The second re-trial was scheduled to start in June 1992, but was adjourned for 3 months due to the absence and unavailability of counsel for Abdool Yasseen between July and September 1992. It eventually started in October 1992 and on 4 December 1992, the accused were again found guilty as charged and sentenced to death. The appeal was heard between April and June 1994, and dismissed. According to the State party, "prior to this final determination, there were two Christmas vacations and annual judicial vacation periods of 2 months or more". The State party thereafter provides a detailed account of the constitutional motion and appeal proceedings filed on the authors' behalf after a warrant for their execution had been issued on 1 February 1996.

5.8 As to conditions of imprisonment for the authors, the State party explains that persons charged with criminal offences awaiting trial in detention are housed in a dormitory at Georgetown Prisons. At no time were the authors kept with convicted prisoners prior to conviction. The dormitory is equipped with adequate lighting, ventilation and mattresses, four toilets and two bathrooms. As prisoners awaiting trial, the authors were allowed visits by friends or relatives twice a week. The State party admits that there is a block at Georgetown Prisons where prisoners with communicable diseases are kept. Abdool Yasseen was never an inmate on that block.

5.9 The State party notes that all inmates at Georgetown Prisons are provided with medical services by qualified medical personnel. Medical records of Abdool Yasseen reveal that he was examined a total of 21 times in the Prison Infirmary. At no time was he diagnosed as mentally unsound nor did he suffer a broken leg nor did he have to move around on crutches. In relation to Mr. Thomas, records reveal that while in prison, he was treated for urinary tract infection, which he had contracted before his incarceration.

5.10 Prisoners under sentence of death are kept in single cells measuring 8 x 8 feet. Cells are illuminated by lighting units placed outside cells to reflect into them, as prisoners on death row are closely watched. The State party notes that there is "adequate ventilation for each cell". Cells on death row do not have self-contained toilets, but prisoners are provided with utensils for urinary and defecatory purposes: "these are emptied and cleansed after use as often as practicable". Recreational facilities are available to all inmates, including the authors, and prisoners are allowed an hour a day for recreational purposes.

5.11 In the authors' cases, both were housed in the remand division of Georgetown Prisons until June 1988. When their appeals were allowed in 1990, they were returned to the remand division. After conviction in December 1992, both were returned to the single cells for prisoners under sentence of death.

6.1 In her comments, counsel notes that the State party does not deny the allegation that Mr. Yasseen was unrepresented during the first four days of the second re-trial, although a request for an adjournment in order to obtain counsel had been made. Whether or not an adjournment was granted for three months in June, it remains that the trial started in October 1992 in the absence of Yasseen's counsel. Yasseen had originally retained B. de Santos, who was paid $ 300,000. One week before the trial was about to begin, de Santos returned the full sum, stating that he was unable to conduct the defense. Yasseen then retained another senior counsel, S. Hardyal, who sought an adjournment from the judge, because he could not attend court at the appointed start date. The adjournment was refused, the trial started and two prosecution witnesses were interrogated and testified in counsel's absence.

6.2 Counsel notes, by reference to the Committee's jurisprudence[1], that the start of the trial in the absence of counsel violated the author's rights under article 14, paragraph 3(b) and (d). She notes that the questioning of two prosecution witnesses in the absence of counsel irreparably obstructed his defense, making it impossible for counsel to subject the prosecution's case to full adversarial challenge. It is emphasized that there can be no question that counsel was absent for relatively unimportant days, e.g. days on which the prosecution rested the case and the trial concerned procedural issues. Rather, counsel was absent the first 4 days of the trial, when the prosecution presented its case against the authors.

6.3 Concerning the allegation that the authors' right to examine witnesses and call evidence under article 14, paragraph 3(e), was violated, since one potentially exculpatory witness, Hiram Narine, did not appear despite summons, and since important police documents and diaries were missing and not produced at trial as requested, counsel recalls the absence of State party information on this point.

6.4 On the issue of the authors' claim that they were coerced to confess the murder of Kaleem Yasseen, counsel notes that the State party itself concedes that the prosecution case rested almost entirely upon the two alleged confessions, without offering a credible account of the circumstances surrounding them. Counsel dismisses the State party's version of the alleged spontaneous confession by Noel Thomas, as written down by Asst. Superintendent Marks, as well as Mr. Yasseen's alleged spontaneous oral confession, as dubious: while the prosecution maintains that the defendants spontaneously elected to forego legal advice and confess in full, Messrs. Yasseen and Thomas consistently maintained that they made no voluntary confessions. Counsel notes that the trial transcript is replete with convincing testimony from the medical examiner who examined Noel Thomas, describing the injuries he was subjected to while being forced to confess. In these circumstances, counsel submits that the two dubious confessions cannot support the authors' conviction and their death sentences.

6.5 Counsel recalls that the State party does not dispute the allegation of a violation of article 14, paragraph 1, because the jury foreman of the second re-trial was related to the wife of the deceased, and merely argues that this issue was not raised in domestic judicial proceedings.

6.6 Counsel contends that the aggregate of delays in the judicial proceedings, between 1988 and 1994, constitute a violation of article 14, paragraph 3(c), of the Covenant. The State party's only explanation for the delay is the statement that , as to the period for the second re-trial and appeal, there were two Christmas vacations and annual judicial vacation periods of 2 months or more. This, it is submitted, is a wholly inadequate explanation given the mental anguish the authors suffered awaiting the determination of their cases.

6.7 Counsel reiterates the allegations pertaining to the deplorable conditions of detention before and after the trial, and forwards two affidavits sworn in November 1997 by the father of Abdool Yasseen and a Georgetown businessman and friend of Abdool Yasseen. Both affidavits testify to the very poor conditions of detention the authors were subjected to, including gross overcrowding, insufficient bedding and toilet facilities, inadequate lighting, cramped accommodations, inadequate clothing and food, insufficient exercise and insufficient access to fresh air. Counsel further notes that the State party does not contest specific allegations concerning the authors' treatment in detention, in particular:

- That the authors sometimes were obliged to sleep on the floor, which is conceded by the remark that prisoners sometimes prefer to sleep on the floor rather than to share mattresses; this is said to be contrary to Rule 19 of the UN Standard Minimum Rules for the Treatment of Prisoners.
- That toilet facilities on death row are inadequate; this is said to be a violation of Rule 16 of the Standard Minimum Rules.
- That the authors' cells on death row have inadequate lighting is conceded by the State party through the remark that cells are illuminated through lighting units placed outside the cells. Counsel submits that lighting units outside the cells do not comply with rule 11 (b) of the Standard Minimum Rules. Moreover, the allegation that the authors were deprived of access to fresh air and sunlight (Rule 11(a) and Rule 21(1) of the Standard Minimum Rules) has not been denied by the State party.
- That the State party concedes that the authors were taken on numerous journeys by public transport and, being handcuffed and in public view throughout the journey, suffered great and unnecessary humiliation.

The above conditions of detention are said to constitute a violation of articles 7 and 10, paragraph 1, of the Covenant.

Reconsideration of admissibility and examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol to the Covenant. It has noted the State party's request of 29 August 1997 that the question of the admissibility of the communication be reconsidered, in the light of the

State party's observations of 3 October 1996 which came to the Committee's attention *after* the communication was declared admissible.

7.2 The Committee observes, in this respect, that the State party's submission of October 1996 addresses the merits of the authors' complaints, and that it does not challenge the admissibility of the communication on any of the grounds enumerated in the Optional Protocol, save for the authors' claim that the jury foreman for the last trial (1992) was related to the deceased's wife. This claim, it argues, was not raised by the authors during the judicial proceedings against them. The Committee observes that in that respect, in effect, domestic remedies have not been exhausted, and, accordingly, the decision of admissibility of 11 July 1997 is set aside in as much as it relates to this claim. As to the other claims made by the authors, the Committee sees no grounds to review its decision of admissibility.

7.3 On the substance of the authors' claims, three distinct complexes must be addressed:
- the issue of the alleged forced confessions of the authors, physical abuse against Mr. Thomas during pre-trial detention, and poor conditions of incarceration during pre-trial detention;
- conditions of detention since the authors' first conviction (1988);
- and issues relating to the conduct of the authors' last trial (1992).

7.4 As to the first issue, the Committee notes that the authors and in particular Mr. Thomas, claim that they were abused in pre-trial custody, that they were detained in poor conditions together with convicted prisoners, and that they were unnecessarily humiliated by virtue of their being transferred handcuffed by public transport to court hearings, in full view of the public. The State party has provided a detailed account of the situation which differs in some respects from that presented by the authors and has provided some explanations for the treatment received. The State party has admitted, however, that detainees are required to share mattresses. The Committee finds that this situation is in violation of the requirements of article 10, paragraph 1, of the Covenant.

7.5 Mr. Thomas argues that he was subjected to ill-treatment in order to force him to confess the killing of Kaleem Yasseen, in violation of article 14, paragraph 3(g). The Committee notes that this claim was examined by the judge at the first trial (1988) during a *voir dire* and found to be lacking in substance. The Committee has no material before it that would indicate whether or not any issues relating to the alleged ill-treatment or the confession were raised at the last trial (1992) or on appeal (1994). In the circumstances, the Committee considers that there is no basis to find a violation of article 14, paragraph 3(g).

7.6 The authors claim that their long detention in degrading conditions violated articles 7 and 10, paragraph 1. They have submitted sworn affidavits in support of their allegation that the conditions of their detention on death row are inhuman and particularly insalubrious. The State party refutes these claims but acknowledges that the authors' cells are illuminated by outside lighting units implying that the cells receive no natural lighting. The Committee considers that the fact that the authors are deprived of natural lighting save for their one hour of daily recreation, constitutes a violation of article 10, paragraph 1, of the Covenant, since it fails to respect the authors' inherent dignity as persons.

7.7 The Committee has noted counsel's claim that Mr. Thomas was not promptly informed of the charges against him, in violation of article 14, paragraph 3(a). This claim is not borne out by the account provided by the State party and was not reiterated by counsel in her comments on the State party's submission of 3 October 1996. There is thus no ground for a finding of violation of article 14, paragraph 3(a).

7.8 In respect of Mr. Yasseen, counsel claims a violation of article 14, paragraph 3(b) and (d), because the author was unrepresented during the first four days of the last trial (1992). The State party has simply noted that an adjournment was granted between July and September 1992, at the request of author's former counsel, but does not otherwise deny the claim. The Committee recalls that it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel is to some degree attributable to the author, and even if the provision of legal assistance entails an adjournment of proceedings. This requirement is not made unnecessary by efforts which the trial judge may otherwise make to assist the accused in the handling of his defense, in the absence of counsel. The Committee considers that the absence of legal representation for Mr. Yasseen during the first four days of the trial constitutes a violation of article 14, paragraph 3(b) and (d).

7.9 Counsel claims that the evidence against the authors was so thin as to turn their conviction and death sentence into a miscarriage of justice. Counsel claims in particular that the author was the victim of a violation of article 14, paragraph 3(e), because at the last trial (1992), a witness did not appear and certain police notebooks and diaries were missing. With regard to the witness, the Committee notes that it appears from the information before it that this witness gave evidence for the prosecution in the first trial (1988). The information before the Committee does not indicate how the absence of this witness at the last trial (1992) could have prejudiced the authors. In the circumstances, the Committee finds that counsel has not substantiated his claim that the failure to ensure the attendance of the witness in the last trial (1992) deprived the authors of their right under article 14, paragraph 3(e).

7.10 With regard to the missing diaries and notebooks, the Committee notes that the authors claim that these may have contained exculpatory evidence. The State party has failed to address this allegation. In the absence of any explanation by the State party, the Committee considers that due weight must be given to the authors' allegations, and that the failure to produce at the last trial (1992) police documents which were produced at the first trial (1988) and which may have contained evidence in favour of the authors, constitutes a violation of article 14, paragraph 3, (b) and (e), since it may have impeded the authors in preparation of their defence.

7.11 Counsel finally claims a violation of article 14, paragraph 3(c), because of the aggregate delays between the author's arrest in 1987, their conviction after two re-trials in December 1992, and the dismissal of their appeal in the summer of 1994. The Committee notes that the delays are not entirely attributable to the State party, since the authors themselves requested adjournments. Nevertheless, the Committee considers that the delay of two years between the decision by the Court of Appeal to order a retrial and the outcome of the retrial, is such as to constitute a violation of article 14, paragraph 3(c).

7.12 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In this case, the authors were convicted after a trial in which they did not have their right to a defense guaranteed. This means that the final sentence of death in their case was passed without having met the requirements of a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 10, paragraph 1, and 14, paragraph 3 (b), (c) and (e), in respect of both authors; and of article 14, paragraph 3(b) and (d), in respect of Mr. Abdool Yasseen.

9. Under article 2, paragraph 3(a), of the Covenant, Messrs. Abdool S. Yasseen and Noel Thomas are entitled to an effective remedy. The Committee considers that in the circumstances of their case, this should entail their release.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about any measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] See Views on communication No.223/1987 (Frank Robinson v. Jamaica), adopted 30 March 1989, paragraph 10.3.

[2] Originals of these affidavits are kept in the case file.

[3] See Views on communication No.223/1987 (Frank Robinson v. Jamaica), adopted 30 March 1989, paragraph 10.3.

APPENDIX

Individual opinion by Committee member Nisuke Ando

I do not oppose the Committee's findings of violations with respect to article 14 of the Covenant. However, I am unable to concur with its finding of a violation with respect to article 10, paragraph 1, for the following reasons:

With respect to the issues under article 10, paragraph 1, (as well as article 7, according to the author), the authors originally made the allegations as indicated in paragraph 3.6 of the Vies. However, these allegations were refuted in detail by the State party in its observations dated 3 October 1996 as indicated in paragraphs 5.4 and 5.8 - 5.11. Then, the authors attempted to challenge these refutations by quoting from the two affidavits which describe the conditions of detention as indicated in paragraph 6.7. In my view the descriptions of the affidavits are all of general nature and, despite the author's attempt, it is indeed doubtful whether and how these general conditions affected each of the two authors specifically. The only point, on which the Committee has managed to base its finding of a violation of article 10, paragraph 1, is the fact that "the authors were deprived of natural lighting save for their one hour of daily recreation", this fact being inferred from the State party's acknowledgement that "the authors' cells are illuminated by outside lighting units *implying* that the cells receive no natural lighting". (See paragraph 7.6. Emphasis supplied.)

I recognize that the authors attempted to base their allegation of a violation of article 10, paragraph 1, of the Covenant on the UN Standard Minimum Rules for the Treatment of Prisoners (see paragraph 6.7). In my view the standard may well represent "desirable" rules concerning the treatment of prisoners and, as such, the Committee may ask a State party to the Covenant to do its best to comply with those rules *when it considers a report of that State party*. Nevertheless, I do not consider that the rules constitute binding norms of international law which the Committee *must* apply in deciding on the lawfulness of allegations of each individual author of communications. In addition, considering the conditions of detention in urban areas of many of the States parties to the Covenant, I am unable to concur with the finding of a violation of article 10, paragraph 1, in this particular communication.

(*Signed*) N. ANDO

(Original: English)

S. Communication No. 704/1996, S. Shaw v. Jamaica*
(adopted on 2 April 1998, sixty-second session)

Submitted by:	Steve Shaw (represented by S. Lehrfreund from Simons Muirhead & Burton)
Victim:	The author
State party:	Jamaica
Date of communication:	6 June 1996 (initial submission)
Date of decision on admissibility and adoption of Views:	2 April 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 1998,

Having concluded its consideration of communication No.704/1996 submitted to the Human Rights Committee by Mr. Steve Shaw, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4 of the Optional Protocol

1. The author of the communication is Steve Shaw, a Jamaican citizen born in 1966, currently awaiting execution at St. Catherine District Prison , Spanish Town, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, paragraphs 2 and 3, 10, paragraph 1, and 14, paragraphs 1 and 3(b), (c) and (d) of the International Covenant on Civil and Political Rights. He is represented by Saul Lehrfreund of the law firm of Simons Muirhead and Burton (London).

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N.Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, and Mr. Maxwell Yalden.
The text of an individual opinion by Committee members N. Ando, P. N. Bhagwati, Th. Buergenthal and D. Kretzmer is attached.

Facts as submitted by the author

2.1 The author was convicted with two co-defendants, Desmond and Patrick Taylors of four counts of capital murder and sentenced to death in the St. James' Circuit Court, Montego Bay, on 25 July 1994. His appeal against conviction was rejected by the Court of Appeal on 24 July 1995. A subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 6 June 1996.

2.2 On 27 March 1992, the decomposing bodies of Horrett Peddlar, his wife, Maria Wright and their two small children Matthew and Useph were found on the grounds surrounding the Peddlar house. They had been "chopped to death" with blows to their heads, bodies and limbs.

2.3 Between 17 and 22 April 1992 the author (also known as "Curly") was supplied with food stuffs by a local shop keeper, against security of a tape deck the author had brought in. On 27 April 1992, the tape deck was handed to the police and identified as belonging to the deceased on 28 April, in the author's presence. The author states that he was detained on 28 April 1992 and taken into custody at Sandy Bay Lock-Up. Evidence of his complicity in the murders was said to have been a number of oral statements made between Easter 1992 and 14 November 1992:

- at Easter 1992, the author told one Ms. Sutherland that he had been a party to the murders of Horrett Peddlar and his wife;
- In an interview preceding a caution statement made on 29 April 1992, the author allegedly said "you see what Boxer [Desmond Taylor] mek mi in a"; in the caution statement, the author described being present at the Peddlar house on the occasion of the murders with Boxer, a man called "President" and Mark [Patrick Taylor]."Boxer" and "President" went into the yard; he saw Boxer chop Ms. Peddlar and President chase after one of the children. Thereafter he helped Boxer and President dispose of their clothes and was given a tape deck;
- an oral statement was made by the author at the police station in the presence of Patrick Taylor, to the effect that "mi and Mark group a de man gate go watch and Boxer and President go over the yard and chop up de people dem";
- An oral statement made on 5 May 1992 in the presence of Desmond Taylor that "Mi see when President run down the bog son and boxer chop up the woman";
- and a statement made on 14 November 1992 to fellow prisoners on remand overheard by officer Wright to the effect that "Mi chop de bwoy Peddlar in a him rass claut".

2.4 At trial, the author made an unsworn statement denying his presence at the murder and denied that he made any admissions to Ms. Sutherland and Officer Wright. No witnesses were called in his defense.

2.5 After his arrest on 28 April 1992, the author was transferred from Sandy Bay lock-up to Montego Bay lock-up. After his oral statement made in the interview preceding his caution statement at Montego Bay Police Station on 29 April 1992, he was taken back to Sandy Bay. On 7 May 1992, he was taken back to Montego Bay and charged with murder. According to his own account, he was thereafter detained for 8 months "incommunicado", that is unable to communicate with lawyers, friends or family. Counsel explains that he has sought to have this information corroborated on at least two separate occasions; the author's account on this point has been consistent. Mr. Shaw indicates that he spent about three months in custody before he was brought before a judge, and that he spent almost one year in the Montego Bay Police Lock-Up before being

The complaint

3.1 Counsel claims that the author's rights under article 9(2) and (3) of the Covenant were violated. It is argued that he was not charged until 19 days after his arrest and that he was not brought before a judge or other judicial officers for three months. During that period, the author claims that he was brutalized by the police, and in such circumstances it was critical that he be brought before a judicial officer without delay.

3.2 The author claims a violation of articles 9(3) and 14(3)(c) of the Covenant because of the State party's failure to bring him to trial within a reasonable period of time. Thus, he spent two years and three months confined at Sandy Bay and Montego Bay Lock-Ups as well as St. Catherine District Prison prior to his trial; a lawyer was only assigned to him in April 1994, some two years after the arrest. Counsel concedes that the complexity of a case is a relevant factor in considering whether there have been violations of the above provisions, but contends that the issues in the case against Mr. Shaw were not complex since the primary evidence against him were his alleged admissions. Nor did he at any stage request an adjournment of the proceedings.

3.3 Mr. Shaw contends that the conditions of his confinement at Sandy Bay and Montego Bay prior to conviction amounted to a violation of articles 7 and 10, paragraph 1 of the Covenant. The author notes that he shared a small cell with as many as 21 other detainees, which meant that most detainees had to stand up or sit down for the whole night. Gross overcrowding of the cell, the necessity of having to sleep on a wet floor, poor ventilation and the inability to see family, relatives or a legal representative are said to constitute a violation of article 7 of the Covenant.

3.4 The author claims a violation of article 14, paragraph 3(b) and (d) of the Covenant, because of absence of adequate facilities to prepare his defense. He notes that the first occasion he met with a lawyer was when he was approached by the lawyer for the Taylor brothers, Mr. Hamilton QC. The latter helped him to obtain the services of a legal aid representative who then was appointed to a post of resident magistrate and had to abandon his representation. Thereafter, it took the author another ten months to obtain legal assistance. Counsel observes that Mr. Shaw instructed the new legal aid representative to call his father as a defense witness; the legal aid lawyer ignored the instruction. Counsel further contends that the same lawyer failed to investigate the author's alibi and did not act on any of his instructions. Counsel's failure to represent the author properly on trial meant that the author was deprived of an opportunity to put any defense to the jury and allowed the trial judge to direct the jury, in accordance with domestic case law, that they could ignore his unsworn statement (in which he had said he was not at the crime scene) if they saw fit. Had evidence in support been called, no such direction could have been given.

3.5 It is submitted that the conditions of detention at St. Catherine District Prison constitute a violation of articles 7 and 10, paragraph 1, of the Covenant. Reference is made to the findings of several reports issued by non-governmental organizations on the conditions of incarceration at St. Catherine District Prison. Conditions of detention applicable to Steve Shaw include:

- No bedding or mattresses are provided;
- Cells have wholly deficient sanitation, no electric light, inadequate ventilation, and the only natural light is admitted through small air vents; for sanitation, only a slop bucket is provided;

darkness. The author is locked in for a minimum of 23 hours a day;
- Lack of provision for health care and medical facilities;
- Absence of reeducation and work programs for condemned inmates on death row.

The author contends that his rights under the ICCPR as an individual are being violated, notwithstanding the fact that he is a member of a recognizable class of people - inmates on death row - who are detained in similar conditions and suffer similar violations of their rights. But a violation of the Covenant does not cease to be a violation merely because others suffer the same deprivations at the same time.

3.6 Counsel argues that the conditions of incarceration and the cell to which the author remains confined also represent a violation of the UN Standard Minimum Rules for the Treatment of Prisoners. Reference is made to the jurisprudence of the Human Rights Committee.[2]

3.7 Counsel argues that an execution which might have been lawful if carried out immediately and without exposing the convicted prisoner to the aggravated punishment of inhuman treatment during a lengthy period of detention on death row can become unlawful if the execution comes at the end of a substantial period of detention in intolerable conditions. Counsel invokes the judgment of the Judicial Committee of the Privy Council in *Pratt and Morgan* as an authority for the proposition that carrying out a sentence of death may become unlawful where the conditions in which a condemned prisoner is held, either in terms of time or physical discomfort, constitutes inhuman and degrading treatment contrary to article 7 of the Covenant. Mr. Shaw "was sentenced to death, not to death preceded by a substantial period of inhuman treatment.... [t]he intervening inhuman treatment .. renders the carrying out of the sentence unlawful".

3.8 It is submitted that the State party violated articles 14, paragraph 1, *juncto* 2, paragraph 3, by denying the author the right of access to court to seek (constitutional) redress for the violation of his fundamental rights which he has suffered. Counsel notes that the State party's failure to provide legal aid for the purpose of constitutional motions violates the Covenant because this denies Mr. Shaw an effective remedy in the process of the determination of his rights. To counsel, proceedings in the Supreme (Constitutional) Court must conform with the requirements of a fair hearing within the meaning of article 14, paragraph 1, encompassing the right to legal aid.

State party's observations and counsel's comments:

4.1 By submission of 10 October 1996, the State party does not challenge the admissibility of the case and offers comments on the merits.

4.2 The State party refutes that there was a breach of article 9, paragraph 2, of the Covenant: "It may have been 19 days before the author was formally charged, but obviously he was aware of the reasons for his arrest before this day. The author was moved between police stations and made several statements (although he now disputes this) on the offences. In these circumstances, it cannot be validly argued that he was unaware of the reasons for his arrest."

4.3 On the issue of the three month delay in bringing the author before a magistrate, the State party concedes that this period is longer than would be desirable, but "it cannot necessarily be argued that this amounted to a breach of the Covenant".

4.4 Concerning the alleged violation of articles 9(3) and 14(3)(c) of the Covenant, on account of the duration of the author's pre-trial detention (2 years and 3 months), the State party notes that during this period, a preliminary inquiry was held and does not accept that this period constituted undue delay.

4.5 The State party indicates that it will investigate the author's claim that he was held "incommunicado" for eight months after his detention. However, the State party observes that "it is significant that these allegations were apparently not raised by author's counsel at the trial where this information, if accepted, may have had a major impact on the case against the author". No information on the result of the State party's investigation had been received by 31 December 1997.

4.6 With respect to the claims under article 14(3) (b) and (d) of the Covenant that the author was unable to see a lawyer of his own choosing and was forced to consult the lawyer of his co-defendants, the State party recalls that the author's own statements show that he was represented by a lawyer who acted only on his behalf. This lawyer subsequently was appointed Resident Magistrate and thus could not represent Mr. Shaw any more. At the trial, the author was represented by counsel, who did consult with him prior to the start of the trial. On this basis, the State party denies that article 14(3)(b) and (d) of the Covenant was violated: as the author was assigned legal aid both for the preliminary inquiry and the trial, the State party has complied with its obligations under the above provisions.

4.7 With regard to the claim that legal aid for a constitutional motion should have been made available to the author, the State party concedes that legal aid is unavailable for the purpose but denies that this constitutes a violation of the Covenant: "[i]n respect of article 14(1), there is no requirement ... that legal aid be made available for constitutional motions".

5.1 In comments, counsel reiterates his allegations under article 9, paragraphs 2 and 3 of the Covenant. He notes that the State party has made no attempt to establish *why* the author was not brought before a court for three months and why such conduct does not breach the Covenant. If Mr. Shaw was only charged 19 days after being detained, this means that he could not have been brought "promptly" before a judicial officer within the meaning of article 9(3). Counsel invokes the Committee's General Comment 8[16], which states that delays under article 9(3) must not exceed a few days, as well as the Committee's jurisprudence that the term "promptly" does not permit a delay of more than 2 to 3 days.

5.2 Counsel reaffirms that the State party is exclusively responsible for the delay in bringing the author to trial: Mr. Shaw was only assigned a legal aid lawyer for the trial on 21 April 1994, two years after arrest, which indicates that the judicial authorities were not ready to proceed before this date. Furthermore, the conduct of a preliminary inquiry does not invalidate the claim of undue delay under articles 9(3) and 14(3)(c) of the Covenant: under Jamaican law, preliminary inquiries are conducted in all murder cases and do not usually result in pre-trial detention exceeding two years.

5.3 Counsel asserts that the author's conditions of detention at the Sandy Bay and Montego Bay police lock-ups violated articles 7 and 10 (1) of the Covenant. The conditions of the author's pre-trial confinement, including gross overcrowding of the lock-up cell, necessity of sleeping on a wet floor, poor ventilation and no opportunity to see relatives, family or a legal representative, violated article 7 of the Covenant.

5.4 As to article 14, paragraphs 3(b) and (d), counsel observes that the State party's obligation under the Covenant is not merely to assign legal aid to the author for the preliminary inquiry and the trial, but to ensure, especially in a capital case, that he is given adequate time and facilities to prepare the defense: "the right to defend means that the accused or his lawyer must have the right to act diligently in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair". The failure of Mr. Shaw's lawyer to investigate his alibi and act on his instructions made his representation ineffective.

5.5 Counsel notes that the State party has failed to react to the author's allegations concerning appalling conditions of detention on death row, said to be in violation of articles 7 and 10(1); he notes that, apart from being contrary to the UN Standard Minimum Rules for the Treatment of Prisoners, these conditions are contrary to the terms of Resolution 1996/15 of the U.N. Economic and Social Council on "Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty".

Admissibility considerations and examination of the merits:

6.1 With the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in June 1996, the author has exhausted all available domestic remedies. The Committee notes that the State party has not raised any objections to the admissibility of the claims. In these circumstances, the Committee deems it expedient to proceed with the examination of the merits of the claims which it considers to be admissible under the Optional Protocol to the Covenant.

6.2 The Committee, accordingly, declares Mr Shaw's claims under articles 7, 9, 10 and 14, paragraphs 1 and 3(b),(c) and (d) of the Covenant, admissible and proceeds with the examination of their substance, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 The author alleges a violation of articles 7 and 10(1) of the Covenant because he was detained in unacceptable conditions for several months following his arrest. The State party has not refuted this claim and promised to investigate it, but failed to forward to the Committee the findings, if any, of its investigation. In the circumstances, due weight must be given to the author's allegations. The Committee notes that during his pre-trial detention, much of which was spent at Montego Bay Police Lock-Up, the author was confined to a cell which was grossly overcrowded, that he had to sleep on a wet (concrete) floor, and that he was unable to see family, relatives or a legal representative until late in 1992. It concludes that these conditions amount to a violation of articles 7 and 10, paragraph 1, of the Covenant, constituting inhuman and degrading treatment and a failure, on the State party's part, to respect the inherent dignity of the author as a person.

7.2 The author claims that his execution after a lengthy period on death row in conditions which amount to inhuman and degrading treatment would be contrary to article 7 of the Covenant. The Committee reaffirms its constant jurisprudence that detention on death row for a specific period - in this case three and a half years - does not violate the Covenant in the absence of further compelling circumstances. The conditions of detention may, however, constitute a violation of articles 7 or 10 of the Covenant. Mr. Shaw alleges that he is detained in particularly bad and insalubrious conditions on death row; the claim is supported by reports which are annexed to counsel's submission. There is a lack of sanitation, light, ventilation and bedding;

confinement for 23 hours a day and inadequate health care. Counsel's submission takes up the main arguments of these reports and shows that the prison conditions affect Steve Shaw himself, as a condemned prisoner on death row. The author's claims have not been refuted by the State party, which remains silent on the issue. The Committee considers that the conditions of detention described by counsel and which affect Mr. Shaw directly are such as to violate his right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1, of the Covenant.

7.3 The author has alleged a violation of article 9 of the Covenant, because 19 days passed between his arrest and his being formally charged. However, it appears from the file that the author was arrested on 28 April 1992 and not on 18 April 1992, as indicated in counsel's submission. Mr. Shaw signed a caution statement on 29 April 1992 in front of a Justice of the Peace. The State party does not contest that the author was kept in custody for at least 9 days before he was formally charged and that there was a further delay of three months before he was brought before a judge or judicial officer. This, in the Committee's opinion constituted a violation of article 9, paragraph 3.

7.4 As to Mr. Shaw's claim that he was not tried without undue delay because of a lapse of 27 months between arrest in April 1992 and trial in July 1994, the Committee has taken note of the State party's argument that the delay is not unduly long primarily because a preliminary inquiry was held during the period. The Committee considers, however, that a delay of 27 months between arrest and trial, during which the author was detained, constituted a violation of his right to be tried within a reasonable time or to be released. The delay is also such as to amount to a violation of the author's right to be tried without undue delay. The State party has failed to provide any justification related, for example, to particular complexities of the case, which would help explain the delay. The Committee accordingly concludes that there has been a violation of articles 9, paragraph 3, and 14, paragraph 3(c), of the Covenant, in the case.

7.5 The author has claimed that he had insufficient opportunity to prepare his defense, and that initially, he had to consult the lawyer of his co-defendants for advice. The State party notes that the author was assigned legal aid for the preliminary inquiry and for his trial, and that with this, its obligations under article 14, paragraph 3(b) and (d), have been met. The Committee notes that it is axiomatic in capital cases that the accused be represented for the preliminary inquiry and for his trial. In the instant case, it is a matter of concern that because author's counsel for the preliminary inquiry had to abandon the defense of Mr. Shaw following a judicial appointment, the author was left without legal representation for a considerable period. However, it appears that there were no proceedings during this period and counsel was assigned to the author some months prior to the start of the trial. This does not in and of itself amount to a breach of article 14, paragraph 3(b) and (d), of the Covenant. The author further claims that his legal aid counsel for the trial failed to call his father as an alibi witness and did not act on his instructions - but it is not apparent from the trial transcript and the material before the Committee that counsel's failure to act on Mr. Shaw's instructions was a function of anything else but her professional judgment. There is no evidence that counsel's behavior was arbitrary or incompatible with the interests of justice. In the circumstances, there has been no violation of article 14, paragraph 3(b) and (d), of the Covenant.

7.6 The author argues that the State party's failure to provide him with legal aid for the purpose of filing a constitutional motion constitutes a violation of his Covenant rights. The determination of rights in proceedings in the

Supreme (Constitutional) Court of Jamaica must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1.[3] In Mr. Shaw's case, the Constitutional Court would be called upon to determine whether his conviction in a criminal case violated guarantees for a fair trial. In these cases, the application of the requirement of a fair hearing in the Constitutional Court should comply with the principles set out in article 14, paragraph 3(d). It follows that where a condemned prisoner seeking constitutional review of alleged irregularities in his criminal trial has no means to meet the costs of legal representation in order to pursue his constitutional remedy and where the interests of justice so require, legal aid should be made available by the State party. In the present case, the absence of legal aid deprived Mr. Shaw of any opportunity to test the irregularity of his criminal trial in a fair hearing in the Constitutional Court; this constitutes a violation of article 14 of the Covenant.

7.7 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In this case, the final sentence of death in Mr. Shaw's case was passed without having met the requirements for a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraph 3, 10, paragraph 1, 14 paragraphs 1 and 3(c), and consequently of article 6, of the Covenant.

9. In all these circumstances, the author is, under article 2, paragraph 3(a), of the Covenant, entitled to an effective remedy entailing commutation of his death sentence.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subjected to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] See communications Nos. 705/1996 (Desmond Taylor v. Jamaica), Views adopted on 2 April 1998 and 707/1996 (Patrick Taylor v. Jamaica), Views adopted on 18 July 1997.

See Views on case 458/1991 (A.W. Mukong v. Cameroon), adopted 21 July 1994, para. 9.3.

See communication No.377/1989 (Anthony Currie v. Jamaica), Views adopted 29 March 1994, para. 13.4; communication No. 707/1996 (Patrick Taylor v. Jamaica), Views adopted 18 July 1997, para. 8.2.

APPENDIX

Individual opinion by Mr. N. Ando, P. Bhagwati, Th. Buergenthal and D. Kretzmer

The author of this communication was tried along with Desmond Taylor whose communication we have just disposed of. We agree with the views expressed by the majority in paragraphs 7.1 to 7.5 but we are unable to agree with the views expressed in paragraph 7.6. We are of the view that in the present case, the State Party was not obliged to grant legal aid to the author for proceeding before the Constitutional Court. The same argument based on Article 14 (3) (d) was advanced on behalf of the author in Desmond Taylor's case, but, disagreeing with the majority, we rejected that argument and held that article 14 (3) (d) had no application to the case of Desmond Taylor and there was no obligation on the State Party to grant him free legal assistance for proceeding before the Constitutional Court. The same reasoning must apply in the present case and we must accordingly hold that, so far as the author is concerned, there was no violation of article 14 (3) (d) and on that account, of article 14 (1).

(Signed) N. ANDO

(Signed) P. N. BHAGWATI

(Signed) Th. BUERGENTHAL

(Signed) D. KRETZMER

(Original: English)

T. Communication No. 705/1996, D. Taylor v. Jamaica*
(adopted on 2 April 1998, sixty-second session)

Submitted by:	Desmond Taylor (represented by Clifford Chance, London)
Victim:	The author
State party:	Jamaica
Date of communication:	14 June 1996 (initial submission)
Date of decision on admissibility and Views:	2 April 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2nd April 1998,

Having concluded its consideration of communication No.705/1996 submitted to the Human Rights Committee by Mr. Desmond Taylor, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Desmond Taylor, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, paragraph 3, 10, paragraph 1, and 14, paragraphs 1 and 3(b), (c) and (d). He is represented by Steven Dale of the London law firm of Clifford Chance.

The facts as submitted by the author

2.2 On 27 March 1992, the decomposing bodies of Horrett Peddlar, his wife, Maria Wright, and their two small children, Matthew and Useph, were discovered on the grounds surrounding the Peddlar home. They had been 'chopped to death' with blows to head, body and limbs.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran el Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. An individual opinion signed by Committee members Ando, Bhagwati, Buergenthal and Kretzmer is attached.

2.3 On the same day, the author, his brother, and several other members of the Taylor family were taken in for questioning; all except Patrick Taylor were allowed to leave on the same day. Patrick Taylor was detained for a period of 26 days and then released. He and the author were rearrested on or about 5 May 1992. Desmond and Patrick Taylor and Steve Shaw were then charged with the murders of the Peddlar family. It was a matter of local knowledge that there had been a longstanding animosity between the Peddlar and Taylor families: Desmond Taylor was a debtor of Mr. Peddlar, and the Taylor brothers had previously been charged with assault on the deceased; criminal proceedings were still pending in 1992 when the Peddlar family was murdered.

2.4 At trial, the author made an unsworn statement denying his presence at the crime scene. The prosecution's case was based on a statement allegedly made in police custody by Patrick Taylor on 4 May 1992. He had been confronted with Steve Shaw in the presence of a police office, and Shaw had allegedly confided to Patrick Taylor that " me did down a June Lawn when me see Mark (Patrick Taylor's alias), Boxer (Desmond Taylor's Alias) and President . . . When me see Mark, President and Boxer, me and Mark go up to a de gate and watch Boxer and President go up a de yard and chop up the people dem." Patrick Taylor allegedly replied "Curly", a name by which Shaw was known and started to cry, saying "Boxer no tell you no if say nothing. Alright sir. Me go up day but me never know say dem serious dem go kill de people dem".

2.5 Thus, the evidence for the author's involvement in the murders was (a) by reason of Shaw's statement that the murders were not carried out by him or Patrick Taylor but by the author and another person; and (b) Patrick Taylor's response to Shaw's allegation when they were brought together during the period they spent in custody in Montego Bay.

2.6 Counsel argues that all available domestic remedies have been exhausted for the purposes of article 5, paragraph 2(b), of the Optional Protocol. While a constitutional motion might be available to Desmond Taylor in theory, it is not available in practice, since he is indigent and the State party does not make available legal aid for the purpose of constitutional motions. Reference is made to the Committee's jurisprudence.

The complaint:

3.1 Counsel alleges a violation of articles 9, paragraph 3, and 14, paragraph 3(c), because of the State party's failure to bring Desmond Taylor to trial within a reasonable time. Thus, the author spent two years and three months in pre-trial detention before his trial and conviction on 25 July 1994. While counsel concedes that the complexity of a case is relevant in considering whether there have been violations of the above provisions, he contends that the issues involved in the case against Desmond Taylor were not complex, as the primary evidence against him was the statement made by the co-accused, Steve Shaw, and his alleged admissions. It is noted that at no stage did the author seek any adjournment of the proceedings.

3.2 It is submitted that there was a breach of article 14, paragraph 3(b) and (d), because the author was assigned the same legal representative as his brother Patrick - one single lawyer represented their interests although the way the prosecution had presented the case against the author and his brother was quite different. Thus, the prosecution contended that the author had directly participated in the killings, whereas the charge against Patrick Taylor was that he was present at the scene and was willing to assist or to encourage. The potential for conflict of interest was therefore serious.

3.3 The above scenario is said to have caused the author real prejudice, because in respect of each of the co-accused, different rules applied. Patrick Taylor, charged with non-capital murder, would be guilty on a simple joint enterprise basis, whereas the author, charged with capital murder, was subject to the different test of the so-called "trigger man" rule in Section 2(2) of the Offences against the Person (Amendment) Act: i.e., that he had to commit an act of violence at his own hand. Counsel argues that the judge failed to direct the jury in the author's case of the requirements of Section 2(2), and that the danger of this occurring would have been substantially reduced if the author had been represented separately.

3.4 It is submitted that the conditions of the author's detention at St. Catherine District Prison amount to a violation of articles 7 and 10, paragraph 1. Reference is made in this context to the findings of various reports issued by non-governmental organizations on conditions of incarceration at St. Catherine District Prison. Conditions of detention applicable to Desmond Taylor include

- confinement to a small cell for 23 hours a day;
- no provision of a mattress or bedding for the concrete bunk used for sleeping;
- wholly deficient sanitation, inadequate ventilation and total absence of natural lighting;
- lack of provision of health care and medical facilities;
- absence of reeducation and work programs for condemned inmates on death row. Counsel argues that Desmond Taylor's rights under the ICCPR as an individual are being violated, notwithstanding the fact that he is a member of a recognizable class of individuals - inmates on death row - who are detained in similar conditions and suffer similar violations of their rights: a violation of the Covenant does not cease to be a violation merely because others suffer the same deprivation at the same time.

3.5 Counsel argues that the conditions of incarceration and the cell to which the author is confined constitute a violation of the UN Standard Minimum Rules for the Treatment of Prisoners. Reference is made to the jurisprudence of the Committee[1].

3.6 It is argued that an execution which might have been lawful if carried out immediately and without exposing the convicted prisoner to the aggravated punishment of inhuman treatment during a lengthy period of detention can become unlawful if the proposed execution comes at the end of a substantial period of detention in intolerable conditions. Counsel relies on the judgment of the Judicial Committee in Pratt and Morgan as an authority for the proposition that carrying out a sentence of death may become unlawful where the conditions in which a condemned prisoner is held, either in terms of time or physical discomfort, constitute inhuman and degrading treatment contrary to article 7. The author "was sentenced to death, not to death preceded by a substantial period of inhuman treatment. ... [t]he intervening inhuman treatment .. renders the carrying out of the sentence unlawful".

3.7 It is submitted that the State party violated article 14, paragraph 1, *juncto* 2, paragraph 3, by denying the author the right of access to court to seek (constitutional) redress for the violation of his fundamental rights which he has suffered. Counsel notes that the State party's failure to provide legal aid for the purpose of constitutional motions violates the Covenant because this denies the author an effective remedy in the process of the determination of his rights. To counsel, proceedings in the Supreme (Constitutional) Court must conform with the requirements of a fair hearing within the meaning of article 14, paragraph 1, encompassing the right to legal aid.

State party's observations and counsel's comments:

4.1 By submission of 10 October 1996, the State party does not challenge the admissibility of the complaint and directly offers comments on the merits. As to the allegations under articles 9(3) and 14(3)(c), it argues that during the 27 months of the author's pre-trial detention, a full preliminary inquiry into the case was held. It rejects the affirmation that 27 months of pre-trial detention constitutes "undue delay".

4.2 Concerning the claim of violation of article 14 paragraph 3 (b) and (d), because the author and his brother were represented by the same legal aid lawyer during their trial in the St. James' Circuit Court, the State party concedes "that it may have been prejudicial to the author, who was on a charge of capital murder, to be represented by counsel who was also representing his brother, who was charged with non-capital murder". However, the State party argues that Desmond Taylor was free to seek separate representation, but that he chose instead to accept joint representation with his brother: that he chose not to exercise his right cannot be attributed to the State party. Given the family relationship, the State party suggests that the author had no difficulty with the arrangement.

4.3 Regarding the allegation that Desmond Taylor was prevented from seeking constitutional redress because of the absence of legal aid for constitutional motions, the State party denies that failure to provide legal aid for such motions amounts to a violation of the Covenant, as there is no requirement to grant legal aid for the purpose. It further notes that indigence is not an absolute barrier to the filing of constitutional motions, as major cases have been filed by indigent individuals, including in the case of Pratt and Morgan v. Attorney-General of Jamaica.

4.4 Given the above, the State party argues that the imposition of the death sentence does not constitute a violation of article 6. It adds that the claim that the trial judge misdirected the jury on the 'trigger man' rule in Section 2(2) of the Offences against the Person (Amendment) Act was examined in detail by the Court of Appeal; moreover, this issue concerned the evaluation of facts and evidence in the case, the examination of which generally falls outside the scope of the Committee's competence.

5.1 In his comments, counsel reaffirms his claim relating to articles 9(3) and 14(3)(c) - the State party's justification that a preliminary inquiry took place during the 27 months of the author's pre-trial detention is dismissed as fallacious, since preliminary inquiries are conducted in all murder cases in Jamaica and do not generally result in pre-trial detention of 27 months. In any event, the preliminary inquiry in the author's case was only held 9 months after the arrest, and the State party fails to explain its course and scope.

5.2 As to article 14, paragraph 3 (b) and (d), counsel argues that his client never volunteered to be represented by the same lawyer as his brother. None of the lawyers who represented him nor the judge at the preliminary inquiry or the trial advised him that not only could he have been represented separately but should have been. The author believed that because he lacked the money to arrange for separate representation, he was obliged to accept the arrangement that he and his brother be represented by the same lawyer. Counsel dismisses as absurd the State party's argument that since the author chose not to exercise his right to be represented separately, any shortcomings in the defense cannot be attributed to it. To argue that the family relationship between Desmond and Patrick suggested acceptance of the representation arrangement is equally fallacious: rather, the close relationship between the brothers, in the context of the significant differences in the nature of the cases against them, made separate representation more important, not less important.

5.3 Counsel adds that representation by the same lawyer caused his client real prejudice. Thus, the author's only meeting with counsel prior to the trial was for some minutes before the preliminary inquiry. Thereafter, the author did not meet with counsel until the trial, and during the trial, he only spoke with him for a few minutes at a time. At no stage did counsel take detailed instructions from the author, nor did he go through the prosecution evidence with the author. Finally, counsel did not call an important witness Desmond Taylor wanted called, and who could have testified that the deceased had been threatened by persons other than the accused. In these circumstances, where counsel was "always in a hurry", the author had wholly insufficient time and facilities for the preparation of his defense. Representation by separate lawyers for the author and his brother would have minimized the chance of such failures and enhanced attention to the preparation of the author's defence.

5.4 It is reaffirmed that failure to provide legal aid for constitutional motions constitutes a violation of articles 14, paragraph 1, juncto 2, paragraph 3, because it deprived the author of a potentially effective remedy. Counsel adds that the author's brother wrote to the Jamaica Council for Human Rights about the possibility of filing a constitutional motion but was informed that the process was expensive, and that no lawyer in Jamaica would agree to representation on a pro bono basis for this purpose.

5.5 Finally, counsel notes that the State party has not reacted to the author's allegations concerning appalling conditions of detention on death row, said to be in violation of articles 7 and 10, paragraph 1; he notes that, apart from being contrary to the UN Standard Minimum Rules for the Treatment of Prisoners, these conditions are contrary to the terms of Resolution 1996/15 of the U.N. Economic and Social Council on "Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty".

5.6 Counsel emphasizes that Desmond Taylor does not agree to a joinder of the examination of the admissibility and the merits of the communication.

Admissibility considerations and examination of the merits:

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 Regarding the claim that the author had insufficient opportunity to prepare his defence and that his representative made little effort to consult with him, take his instructions or trace and call witnesses, the Committee recalls that counsel was initially privately retained. It is of the opinion that the State party cannot be held accountable for any alleged deficiencies in the defence of the accused or alleged errors committed by the defense lawyer, unless it was manifest to the trial judge that the lawyer's behavior was incompatible with the interests of justice. In the present case, there is no indication that author's counsel, a Queen's Counsel, was not acting other than in the exercise of his professional judgment by deciding to ignore certain of the author's instructions and not to call a witness. This claim is accordingly inadmissible under article 2 of the Optional Protocol.

6.3 With the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in June 1996, the author has exhausted all available domestic remedies. In the circumstances, the Committee deems it expedient to proceed with the examination of the merits of the case; it notes that the State party has not raised any objections to admissibility, while the author wishes to see admissibility and merits to be dealt with separately. The Committee notes that while reiterating this request, counsel has also commented on the State party's arguments relating to the merits. As both parties have had the full opportunity to comment on each other's merits submissions, the Committee considers that it should proceed with the examination of the merits of the communication.

6.4 The Committee, accordingly, declares the author's remaining claims admissible and proceeds with the examination of their substance, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 Concerning the author's contention that he was not tried without undue delay because of a lapse of nearly 27 months between arrest in May 1992 and trial in July 1994, the Committee has noted the State party's contention that this delay is not unduly long mainly because a preliminary inquiry was held during the period. The Committee considers however, that a delay of two years and nearly three months between arrest and trial, during which Desmond Taylor was detained, constitutes a violation of his right to be tried within a reasonable time or to be released. The delay of 27 months between arrest and trial is also such as to amount to a violation of the author's right to be tried without undue delay. The State party has not provided any arguments related for example to particular complexities of the case, which could have justified such delay. The Committee accordingly concludes that there has been a violation of articles 9, paragraph 3, and article 14, paragraph 3(c), in the case.

7.2 Mr. Taylor contends that his defence was flawed because he was represented by the same lawyer as his brother, although there was a conflict of interest between them, since the charges against the brothers differed. The Committee recalls that Desmond and Patrick Taylor were represented by senior counsel, that counsel was privately retained by the brothers for the preliminary enquiry and that at the start of the trial counsel requested that he be assigned on a legal aid basis to both the author and his brother. The Committee observes that both defendants denied their presence at the scene of the crime, or any knowledge of it and that they denied the statements attributed to them. There was in these circumstances no potential for conflict of interests in their defence. Neither was putting forward any evidence or submissions which reflected on the other. The Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 3 (b) and (d), of the Covenant.

7.3 Mr. Taylor argues that the State party's failure to provide him with legal aid for the purpose of filing a constitutional motion constitutes a violation of his Covenant rights. The determination of rights in proceedings in the Supreme (Constitutional) Court of Jamaica must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1.[2] In the author's case, the Constitutional Court would be called upon to determine whether the author's conviction in a criminal case violated the guarantees of a fair trial. In these cases, the application of the requirement of a fair hearing in the Constitutional Court should comply with the principles set out in article 14, paragraph 3(d). It follows that where a condemned prisoner seeking constitutional review of irregularities in his criminal trial has no means to meet the costs of legal representation in order to pursue his constitutional remedy and where the interest of justice so requires, legal aid should be made available by the State party. In the instant case, the absence of legal aid deprived the author of an opportunity to test the irregularity of his criminal trial in the Constitutional Court in a fair hearing; this constitutes a violation of article 14.

7.4 The author claims that his execution after a lengthy period on death row in conditions which amount to inhuman and degrading treatment would be contrary to article 7 of the Covenant. The Committee reaffirms its constant jurisprudence that detention on death row for a specific period - in this case three and a half years - does not violate the Covenant in the absence of further compelling circumstances. The conditions of detention may, however, constitute a violation of articles 7 or 10 of the Covenant. Mr. Taylor alleges that he is detained in particularly bad and insalubrious conditions on death row; the claim is supported by reports which are annexed to counsel's submission. There is a lack of sanitation, light, ventilation and bedding; confinement for 23 hours a day and inadequate health care. Counsel's submission takes up the main arguments of these reports and shows that the prison conditions affect Desmond Taylor himself, as a condemned prisoner on death row. The author's claims have not been refuted by the State party, which remains silent on the issue. The Committee considers that the conditions of detention described by counsel and which affect Mr. Taylor directly are such as to violate his right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1.

7.5 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, a violation of article 6 of the Covenant if no further appeal against the sentence is possible. In Mr. Taylor's case, the final sentence of death was passed without having met the requirements for a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 9, paragraph 3; 10, paragraph 1, 14, paragraph 1, and 14, paragraph 3(c), and consequently of article 6 of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, Desmond Taylor is entitled to an effective remedy entailing the commutation of his death sentence.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2)of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subjected to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] Views on communication No.458/1991 (Albert W. Mukong v. Cameroon), adopted 21 July 1994, para. 9.3.

[2] See communication No.377/1989 (A. Currie v. Jamaica), Views adopted 29 March 1994, paragraph 13.4; communication No.707/1996 (Patrick Taylor v. Jamaica), Views adopted 18 July 1997, para. 8.2.

APPENDIX

Individual opinion (partly dissenting) by Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Th. Buergenthal and Mr. D. Kretzmer

The facts relating to this communication sent by the author are set out in the views expressed by the majority members of the Committee and it is therefore not necessary to reiterate them. We may straight away proceed to consider the questions arising in the communication.

The conclusions reached by the majority members are contained in paragraphs 7.1 to 7.5 of the views expressed by them. We agree with the conclusions set out in paragraphs 7.1, 7.2 and 7.4 and we do not therefore see any reason to repeat what is already stated in those paragraphs beyond stating that we are wholly in agreement with the conclusions set out in those paragraphs: we are however unable to agree with the reasoning contained in paragraph 7.3 and the conclusion reached in that paragraph. We are of the view that in the present case, the State Party was not obliged to grant legal aid to the author for proceeding before the Constitutional Court. Our reasons for saying so are the following.

It is undoubtedly true that in Patrick Taylor's case, the Committee took the view that legal aid to an indigent accused for proceeding before the Constitutional Court is a requirement of Article 14 (3) (d) of the Covenant. But on a further consideration of the question, we are of the view that our decision on this question in Patrick Taylor's case requires reconsideration. Article 14 (3) (d) sets out the guarantees of legal assistance to a poor accused which must be observed "in the determination of any criminal charge against" an accused person. The determination of the criminal charge is carried out by the Trial Court and on appeal, by the appellate Court. The Constitutional Court does not determine the criminal charge against the accused. It merely decides a constitutional issue -whether the decision of the Trial Court or the Appellate Court suffers from any constitutional infirmity. The Constitutional Court does not determine the guilt of the accused and the proceeding before the Constitutional Court can therefore not be regarded as an integral step in the criminal process leading to the determination of the criminal charge. The conclusion is therefore inevitable that article 14 (3) (d) has no application in relation to a remedy before the Constitutional Court.

Moreover, the same constitutional questions which, it is alleged, the author could have raised by filing a petition before the Constitutional court, were all raised and in any event, could have been raised before the Court of Appeal and the Judicial Committee of the Privy Council. The Court of Appeal as well as the Judicial Committee of Privy Council had jurisdiction to decide constitutional issues relating to compliance of executive action or judicial proceeding with the constitution and the law and theses issues were or could have been raised before the Court of Appeal and the Judicial Committee of the Privy Council. The Judicial Committee of the Privy Council however rejected the application of the author for special leave to appeal. Thereafter there could be no scope for going to the Constitutional Court.

Furthermore, even if article 14 (3) (d) were applicable in relation to the

Constitutional Court, what it requires is that legal assistance be assigned to an accused without any payment by him/her, "in any cases where the interests of justice so require". The author has not provided any ground on the basis of which the Committee can hold that the interests of justice required that free legal assistance should have been provided to him. It is therefore not possible to hold that article 14 (3) (d) was violated by the State party.

On this view of the case, we cannot hold that there was any violation of article 14 (3) (d) and on that account, of article 14 paragraph 1.

(Signed) N. ANDO

(Signed) P. N. BHAGWATI

(Signed) Th. BUERGENTHAL

(Signed) D. KRETZMER

(Original: English)

U. Communication No. 706/1996, T. v. Australia* (adopted on 4 November 1997, sixty-first session)

Submitted by: Mrs. G. T.

Victim: The author's husband, T.

State party: Australia

Date of communication: 10 May 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 November 1997,

Having concluded its consideration of communication No. 706/1996 submitted to the Human Rights Committee by Mrs. G. T. on behalf of her husband, T., under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mrs. G. T., an Australian citizen, residing in Castlemaine, Victoria. She submits the communication on behalf of her husband, T., a Malaysian citizen born in 1962, currently in Australia under threat of deportation. She claims that her husband's deportation to Malaysia would violate his right to life.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the case. The text of two individual opinions signed by three Committee members is attached.

Facts as submitted

2.1 T. was convicted in Australia for importing around 240 grams of heroin from Malaysia into Australia in 1992, and was sentenced to six years' imprisonment. On 15 June 1993, while in prison, T. sought refugee status, which was rejected on 10 August 1993. An application for review was refused by the Refugee Tribunal on 6 July 1994, which considered that there was a real chance that T. would face the imposition of the death penalty by the Malaysian authorities, but that this did not constitute persecution in terms of the Refugee Convention.

2.2 Following his release on parole, on 25 October 1995, T. applied for a protection visa, under section 417 of the Migration Act. This visa was refused. At the time of submission of the communication, this refusal was before the Australian Federal Court.

2.3 The author married T. on 21 January 1996. He became the stepfather of her sons. She states that if her husband is extradited to Malaysia, he will be charged there again under the Dangerous Drugs Act, section 39B of which provides for the mandatory death penalty for trafficking drugs.

2.4 At the time of the communication, T. was in Australia on a "bridging visa E", which expired on 9 June 1996. The author feared that her husband would be deported after the expiry of this visa, as she expected the Federal Court to confirm his deportation.

The complaint

3.1 The author claims that her husband's deportation to Malaysia, where there is a real chance that he will face the death penalty, will violate Australia's duty to protect his right to life. In this context, the author notes that Australia itself has abolished the death penalty.

3.2 In support of her claim, the author refers to a letter from the Australian Office of Amnesty International, dated 25 March 1996 and addressed to the Minister for Immigration and Ethnic Affairs. In the letter, AI opposes the forcible return of T., as it believes that he will face the death penalty in Malaysia as a result of his conviction in Australia. In this context, AI notes that a person found to have been in possession of more than 15 grams of heroin faces a mandatory death sentence in Malaysia.

3.3 The author further states that the Dangerous Drugs Act provides for elimination of bail, so that persons awaiting trial are always kept in detention. She further states that there is a delay of up to four or five years for the initial trial, and three of four years for an appeal. She therefore argues that her husband would also likely spend seven to nine years in prison before being executed.

3.4 She further states that an amendment to the law, now also provides for the mandatory whipping for everyone convicted under the Dangerous Drugs Act, although it is not clear whether this is also applied in capital punishment cases.

3.5 It is further submitted that persons suspected of drug offences can be detained for up to two years in preventative detention without a possibility of recourse to the courts. She argues that this would be in violation of the right not to be arbitrarily detained.

3.6 The author also claims that the investigation in her husband's case would not be fair, and that he will not receive a fair trial, because of his ethnicity and his lack of full understanding of Malay, in violation of his right to equality before the law.

3.7 The author concludes that by returning her husband to Malaysia, Australia will violate its fundamental duty of protection, and will cause a trauma for her and her sons.

Committee's rule 86 request

4.1 On 17 June 1996, the Committee, acting through its Special rapporteur for New Communications, requested the State party not to deport T. to Malaysia or to any country where he would likely face the death sentence.

4.2 On 3 June 1997, the State party requested the Committee to lift its request under rule 86. In this context, it referred to assurances which it had received from the Malaysian Government that "any Malaysian national who had committed and being sentenced overseas on the charge of any offence committed overseas will not be prosecuted upon his return to Malaysia for a charge or charges relating to his offence committed overseas. As such, the question of double jeopardy will not arise. Nevertheless, a Malaysian national may be charged by the Malaysian authorities due to other offences that he might had committed in Malaysia." The State party added that the contents of the Malaysian assurances had been brought to the attention of T. by letter of 30 May 1995, who replied by letter of 7 June 1995 that the information was "very comforting and reassuring".

State party's observations on admissibility and merits

5.1 The State party requests the Committee to examine admissibility and merits of the communication simultaneously. The State party has identified the issues raised by the author in her communication as issues under articles 2, 6, 7, 9, 14 and 26 of the Covenant.

5.2 The State party explains that T.'s application to the Federal Court was finalised on 11 March 1997, when he withdrew his application in the light of the Court's recent ruling in a similar case. Following T.'s further application under section 417 of the Migration Act 1958, which allows the Minister to grant persons the right to stay in Australia for humanitarian reasons, he has been granted a further bridging visa until 11 July 1997. Should his request not have been considered by that date, he would be eligible for an extension of the visa.

5.3 As to article 2, the State party argues that the rights under this provision are accessory in nature and linked to the other specific rights enshrined in the Covenant. It recalls the Committee's interpretation of a State party's obligations under article 2, paragraph 1, pursuant to which if a State party takes a decision concerning a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant[1]. It notes however that the Committee's jurisprudence has been applied so far to cases concerning extradition, whereas the author's case raises the issue of the "necessary and foreseeable consequence" test in the context of expulsion of an individual who was convicted of serious drug offences and who has no legal basis for remaining in Australia: it cannot be said that a retrial for drug trafficking offences is certain or the purpose of returning T. to Malaysia.

5.4 In the State party's opinion, a narrow construction of the "necessary and foreseeable consequences" test allows for an interpretation of the Covenant which balances the principle of State party responsibility embodied in article 2 (as interpreted by the Committee) and the right of a State party to exercise its discretion as to whom it grants a right of entry. To the State party, this interpretative approach retains the integrity of the Covenant and avoids a misuse of the Optional Protocol by individuals who entered Australia for the purpose of committing a crime and who do not have valid refugee claims.

5.5 Regarding article 6, the State party recalls the Committee's jurisprudence as set out in the Views on communication No. 539/1993[2] and notes that while article 6 of the Covenant does not prohibit the imposition of the death penalty, Australia has, by accession to the Second Optional Protocol to the Covenant, undertaken an obligation not to execute anyone within its jurisdiction and to abolish capital punishment. The State party argues that the author has failed to substantiate her allegation that it would be a necessary and foreseeable consequence of her husband's mandatory removal from Australia that his rights under article 6 of the International Covenant on Civil and Political Rights and article 1, paragraph 1, of the Second Optional Protocol will be violated; this aspect of the case should be declared inadmissible under article 2 of the Protocol, or dismissed as being without merits.

5.6 According to the State party, the mere allegation that T. would be liable under the Dangerous Drugs Act 1952, upon his return to Malaysia, is insufficient to substantiate the claim that there is a real risk that he will be charged, prosecuted and sentenced to death. The State party notes that expulsion is distinguishable from extradition in that the very purpose of extradition is to return a person for prosecution or to serve a sentence, whereas no such necessary connection exists between expulsion and possible prosecution.

5.7 The State party submits that the author has failed to provide any evidence that T. will be prosecuted, or is likely to be prosecuted, on his return to Malaysia. The State party refers to the assurances given by Malaysia (see paragraph 4.1) and argues that a written assurance from a receiving State should be accepted as conclusive evidence that there is no necessary and foreseeable risk of a violation. The State party submits that further inquiries confirm that there is no risk to T. of prosecution. In this context, it refers to information from the Australian Mission in Kuala Lumpur that: "The Royal Malaysian Police have orally confirmed to us that they do not institute criminal proceedings for trafficking in drugs against a person returned to Malaysia - that is for exporting narcotics - and to our knowledge this has never occurred nor do any of our interlocutors consider it ever likely to occur. We have no reason to doubt that Malaysia will continue to abide by the principles governing double jeopardy as it has in the past." The State party adds that in three previous cases concerning persons convicted and sentenced for drug trafficking offences in Australia, it sought advice on whether that person might be subject to charges in Malaysia relating to the drug trafficking offence. On each occasion, the information confirmed that such a risk would not arise. The State party has no evidence that a person in similar circumstances as T. has been charged and executed on return to Malaysia.

5.8 As regards the author's reliance on the Refugee Review Tribunal's opinion that there is a real chance that her husband would be charged under the Dangerous Drugs Act, the State party explains that in the Tribunal's jurisprudence a "real chance" is one that is "not remote" regardless of whether it is less or more than 50 per cent. This approach is consistent with the objects of the Refugee Convention and reflects the practical evidential difficulty of proving a refugee claim but, according to the State party, it does not suffice for the purposes of proving a violation of the Covenant. In this context, the State party argues that it would be incorrect to interpret the Covenant either by reference to interpretations of domestic law or by reference to the requirements of the Refugee Convention. The State party argues that the "necessary and foreseeable consequence" test places a higher burden on a complainant than that of "real chance". According to the State party, under the Covenant the individual is required to demonstrate that a prospective violation can be foreseen and is inevitable and that there is a clear causal link between the decision of the expelling State and the future violation by the receiving State.

5.9 In respect to the claim that T. is likely to be subject to corporal punishment or extended periods on death row when sentenced under Malaysian law, the State party refers to its arguments in relation to article 6 of the Covenant and argues that no real risk exists that he will be prosecuted under the Dangerous Drugs Act.

5.10 Alternatively, the State party submits that the author has provided insufficient evidence that T., if he would be prosecuted and convicted, is at risk of being subjected to caning or to a unreasonable period of detention on death row. In this context, the State party refers to information received from its Mission in Kuala Lumpur regarding the detention on death row that "it is the considered view of our interlocutors that there is nothing notably inhumane or unusually harsh about the conditions of those placed in Malaysia's death row". The State party contends that the author offers insufficient evidence that T., in the particular circumstances of his case, is personally at risk of caning or being held for an unreasonable length of time on death row.

5.11 As regards article 9 of the Covenant, the State party accepts that the Dangerous Drugs (Special Preventative Measures) Act 1985 provides for preventative detention of persons suspected of involvement in drug trafficking. It also accepts that the Act provides for the detention of such a person for up to two years for the purposes of questioning and the investigation of offences. The State party further acknowledges that it is likely that T. will be questioned on return to Malaysia in connection with the offences for which he was convicted in Australia. It argues however that the mere questioning of an individual on return to his country of nationality in relation to his conviction by another State does not of itself amount to a necessary and foreseeable breach of his Covenant rights.

5.12 According to information received by the Australian Mission in Kuala Lumpur, a Malaysian national convicted of drug trafficking offences overseas would probably be put on a watch-list. The deportee would be met on arrival at the airport by members of the Anti-Narcotics Branch of the Malaysian Police. He would be interviewed to gain insight into his role and, if the police determined that he had limited involvement in trafficking of the drug, was not a member of a criminal syndicate and has little intelligence to offer, preventative detention could well not occur. The State party emphasizes that preventative detention is not automatic and depends on the circumstances of each individual case. In the case of T., he had never been sentenced for a drug offence before, and he has claimed that he is not part of a drug network and that he did not know the contents of the bag containing heroin. In those circumstances, it is not likely according to the State party that he would be kept in preventative detention. Moreover, the Act provides for restriction orders as an alternative to detention. In view of all this, the State party argues that detention in violation of article 9 is not a necessary and foreseeable consequence of Australia's decision to return T. to Malaysia.

5.13 The State party argues that its obligation in relation to future violations of human rights by another State arises only in cases involving a potential violation of the most fundamental human rights and does not arise in relation to allegations under article 14, paragraph 3. It recalls that the Committee's jurisprudence so far has been confined to cases where the alleged victim faced extradition and where the claims related to violations of articles 6 and 7. In this context, it refers to the jurisprudence of the European Court of Human Rights in the case of Soering v. United Kingdom, where the Court, while finding a violation of article 3 of the European Convention, stated in respect of article 6 that issues under that provision might only exceptionally be raised by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of due process in the requesting state. In the instant case, the author claims that T. will not get a fair trial because of his Chinese ethnicity, since he cannot read or write English and is not fluent in Malay. Information provided by the Australian Mission in Kuala Lumpur shows that an accused would have access to proper legal representation and to interpretation services, as well as to legal aid. The State party argues therefore that there is no real risk that T.'s rights under article 14 would be violated.

5.14 As regards the author's claim that her husband would be subject to discrimination on the ground of his Chinese ethnicity, the State party argues that this claim should be declared inadmissible for failure of substantiation or should be dismissed as unmeritorious. In this respect, the State party refers to its arguments relating to articles 6 and 14, as well as to the decision of the Refugee Review Tribunal in T.'s case, where the Tribunal found that his lack of fluency would not preclude a fair interrogation by the police, and that there was no evidence that the death penalty was disproportionately applied to Chinese compared to members of other ethnic groups.

Author's comments on the State party's observations

6.1 By submission of 4 October 1997, the author requests the Committee to maintain its request to the State party not to return T. to Malaysia. She notes the assurances given by the Malaysian Government, that a Malaysian national will not be prosecuted for crimes which he committed in another country, but points out that it is also said that he may be charged with offences committed under Malaysian law. She contends that, since it is obvious that the drugs found in her husband's possession when he came off the plane were obtained in Malaysia, it is clear that he committed a criminal offence in Malaysia under section 37 of the Dangerous Drugs Act, which provides for the mandatory death penalty for trafficking drugs. Section 37(d) of the same Act provides that any person who is found to have had drugs in his custody or under his control shall be deemed to have known the nature of such drug. She concludes that the so-called assurances from the Malaysian Government do not preclude the possibility that her husband will be prosecuted upon return.

6.2 As to her husband's letter of reply to the assurances, the author explains that this letter was written by another inmate in prison, and that her husband signed the letter thinking it was a thank you letter in general terms. In this context, she explains that her husband's knowledge of English is limited and that he cannot write or read it.

6.3 The author reiterates that a "real chance" exists that her husband's rights under the Covenant will be violated upon his return to Malaysia, in particular his right to life. She claims that Australia has a duty under the Covenant to prevent the violation of Covenant rights by allowing her husband to stay in the country. In this context, she states that in 1994, the Australian Federal

Government offered T. protection in exchange for assistance in disclosing involvement of federal officers in tampering with imported drugs. However, he declined the offer fearing that his life would be endangered in Australia as well, if he would cooperate. The author suggests that the Government at that time tried to make her husband cooperate knowing that he would face danger in Malaysia and making use of his fear in this respect.

6.4 The author acknowledges that her husband's expulsion does not have as its purpose his handing over to stand trial. However, she states that it is beyond doubt that the Malaysian Government will take action against her husband for the drugs that he had in his possession in Malaysia, and that by making this possible through expelling him, Australia will become an accessory to the violation of her husband's Covenant rights in Malaysia.

6.5 The author acknowledges that Australia has an interest in promoting the security of its society, but states that her husband has already served the sentence the courts imposed upon him, that he has been reformed, that he has no more dealings with drugs, that he has been working for a year and that he is striving for forgiveness of his past wrongs. He wishes to start a new life and to raise a family. The author does not question Australia's right to decide to whom it grants entry, but according to her, Australia's duty to protect life must prevail.

6.6 As regards the risk of prosecution under the Dangerous Drugs Act, the author recalls that the death penalty is mandatory in Malaysia for trafficking in drugs. She submits that her husband's family have made inquiries and found that his name is placed on the Malaysian computers for arrest. It is said that T.'s mother fears for his life and has even come to Australia to persuade him not to return to Malaysia. The author argues that even if there were only a remote chance of prosecution, this would constitute a real risk. In this context, she notes that the State party has not provided conclusive evidence that her husband will not be arrested in Malaysia for exporting drugs, therefore her husband has a well-founded fear that he will be arrested and prosecuted under the Dangerous Drugs Act. Since it is not possible to predict the outcome of such prosecution, a real risk exists that the death penalty will be imposed.

6.7 As regards the information gathered by the Australian Mission in Kuala Lumpur, the author notes that there is no written proof of these assurances, and that the only written assurances do not exclude prosecution for exporting drugs. The author requests the Committee to give full consideration to even a remote chance of prosecution rather than a foreseeable consequence. The author refers to the Committee's jurisprudence that the words of the Covenant have a meaning separate from that of the national legal system and states that this is the reason why she submitted her husband's case. Since the Australian legal system has failed to protect his life, she expects the Committee to uphold her husband's right to life.

Issues and proceedings before the Committee

7.1 The Committee appreciates that the State party has, although challenging the admissibility of the author's claims, also provided information and observations on the merits of the allegations. This enables the Committee to consider both the admissibility and the merits of the present case, pursuant to rule 94, paragraph 1, of the Committee's rules of procedure.

7.2 Pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

7.3 The author has claimed that her husband would face unequal treatment because of his ethnic background and his poor knowledge of Malay, and that this would render the trial against him unfair. The Committee notes that the author has failed to provide sufficient substantiation of her claim, for purposes of admissibility. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

7.4 As regards the author's claim that the deportation of her husband would violate the rights to family life protected under articles 17 and 23 of the Covenant, the Committee finds that this claim is not sufficiently substantiated for purposes of admissibility and thus inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that no obstacles to the admissibility of the author's remaining claims exist and proceeds with an examination of the merits of the case.

8.1 What is at issue in this case is whether by deporting T. to Malaysia, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.

8.2 If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

8.3 The Committee observes that article 6, paragraphs 1 and 2 read together, allows the imposition of the death penalty for the most serious crimes, but that the Second Optional Protocol, to which Australia is a party, provides that no one within the jurisdiction of a State party shall be executed and that the State party shall take all necessary measures to abolish the death penalty in its jurisdiction. The provisions of the Second Optional Protocol are to be considered as additional provisions to the Covenant.

8.4 In cases like the present case, a real risk is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases. The Australian Government is deporting T. from its territory because he has no entitlement to remain in Australia; Malaysia has not requested T.'s return. Although the Committee considers that the "assurances" given by the Malaysian Government do not as such preclude the possibility of T.'s prosecution for exporting or possessing drugs, nothing in the information before the Committee points to any intention on the part of Malaysian authorities to prosecute T. The State party itself has made investigations into the possibility of the imposition of the death sentence for T. and has been informed that in similar cases no prosecution has occurred. In the circumstances, it cannot be concluded

that it is a foreseeable and necessary consequence of T.'s deportation that he will be tried, convicted and sentenced to death.

8.5 The Committee therefore concludes that Australia would not violate T.'s rights under article 6 of the Covenant and article 1 of the Second Optional Protocol if the decision to deport him were to be implemented.

8.6 In assessing whether the author could be exposed to a real risk of a violation of article 7 of the Covenant, because he might be subjected to caning, considerations similar to those detailed above in paragraph 8.4 apply. The information before the Committee does not indicate that any treatment in violation of article 7 of the Covenant is the foreseeable and necessary consequence of T.'s deportation from Australia. The Committee concludes that Australia would not violate its obligations under article 7 of the Covenant if it deports T. to Malaysia.

8.7 With regard to the possible preventative detention of T. under the Dangerous Drugs (Special Preventative Measures) Act 1985, the Committee notes that it is likely that T. will be detained for questioning upon his return to Malaysia. According to the State party, however, preventative detention is not automatic and is not likely to occur in the instant case, taking into account T.'s limited knowledge of the trafficking in which he was involved. The author has not challenged this information, and only relies on the existence of the law in claiming that there is a risk that her husband may be subject to preventative detention. In the circumstances, the Committee cannot conclude that T.'s deportation to Malaysia would amount to a violation by Australia of his rights under article 9 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by Australia of any of the provisions of the Covenant.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

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[1] See Views on communications Nos. 469/1991 (Ch. Ng v. Canada), adopted on 5 November 1993, paragraph 6.2; and 470/1991 (J. Kindler v. Canada), Views adopted 30 July 1993.

[2] Communication No. 539/1993 (Keith Cox v. Canada), Views adopted 31 October 1994, para. 16.1.

APPENDIX

A. Individual opinion by Committee member Martin Scheinin *(dissenting)*

To my regret I have had to disagree with the Committee's decision to deal jointly with the admissibility and merits of the present case. This possibility, provided for by the Committee's rules of procedure, should not in my opinion be resorted to in every case. In relation to the present communication, in which the author did not specify the Covenant articles she invoked, the merger of admissibility and merits has meant that the State party has in fact had the possibility to determine, in its rejoinder, the substantive issues to be dealt with by the Committee.

In my opinion the communication raises more issues under the Covenant than those to which the State party replied. In particular, this is true for the protection of family life under article 17 and article 23, paragraph 1. The State party has failed to address the issue of whether the reasons justifying the deportation of a person who has fully served his criminal sentence and who has already been able to re-establish his family life are weighty enough to legitimize the adverse consequences for the family life of the person and his closest ones. In my opinion, the Committee should have taken a separate decision declaring the case admissible and asking the State party to again comment on the merits of the case, at least in relation to articles 17 and 23.

As far as the remaining aspects of the case are concerned, I wish to emphasize that several factors distinguish the present case from the Committee's previous decision in A.R.J. v. Australia (communication No. 692/1996). I refer to the dissenting opinion by Mr. Klein and Mr. Kretzmer and find that Australia would violate its obligations under article 7 of the Covenant, the prohibition of torture or cruel, inhuman or degrading treatment, if the decision to deport Mr. T. to Malaysia were to be implemented.

(Signed) M. SCHEININ

(Original: English)

B. Individual opinion by Committee members Eckart Klein and David Kretzmer *(dissenting)*

1. The question in this communication is whether the author's husband T will be subject to a real risk of the death penalty if the State party deports him to Malaysia. In assessing whether such a risk has been established two factors have to be considered:

    (a) Does the law in Malaysia provide the death penalty for an act committed by T.?
    (b) If the answer to a. is positive, what are the chances that the law will be enforced if T. returns to Malaysia?

2. The author has presented evidence to the Committee that a person found to have been in possession of more than 15 grams of heroin faces a mandatory death sentence in Malaysia. This evidence was not contradicted by the State party. As T. was convicted of importing 240 grams of heroin from Malaysia into Australia it has been clearly established that under Malaysian law he is subject to a mandatory death sentence. This clearly distinguishes this communication from communication No. 692/1996, decided by the Committee in July

1997, since in that communication there was clear evidence that the maximum sentence in Iran for trafficking the amount of cannabis the author was convicted of possessing in Australia was five years' imprisonment (see para. 6.12 of Committee's Views). The argument of the author in that case was that the death penalty would be imposed, even though it was not provided for under Iranian law. The argument in the present case is that the Malaysian authorities will apply their law under which the death penalty is mandatory.

3. We cannot accept the approach inherent in the Committee's statement that "nothing in the information before the Committee points to any intention on the part of the Malaysian authorities to prosecute T." (para. 8.4). As the death penalty is mandatory for the offence committed by T. in Malaysia, we must assume that this penalty will be imposed in Malaysia. The question is not whether an intention of the Malaysian authorities to prosecute T. has been proved, but whether strong evidence has been provided to refute the assumption that Malaysian law will be applied. The answer is negative.

4. The assurances provided to the State party by the Malaysian authorities and mentioned in para. 4.2 of the Committee's Views clearly leave open the door to charge T. for an offence committed in Malaysia. We cannot ascribe much weight to the oral confirmation of the Royal Malaysian Police, mentioned in para. 5.7 of the Committee's Views, that they do not institute criminal proceedings for trafficking in drugs against a person returned to Malaysia. The assessment of the Australian Mission in Kuala Lumpur, which received this oral confirmation, was that "Malaysia will continue to abide by the principles of double jeopardy as it has in the past." However, the question of double jeopardy would arise only if Malaysia were to prosecute T. for acts which constituted the crimes for which he was convicted in Australia. It would not arise if the Malaysian authorities were to prosecute T. for possession of drugs in Malaysia or for exporting drugs from that country. As these acts carry a mandatory death sentence under Malaysian law something stronger than a vague oral confirmation is required to refute the assumption that the Malaysian authorities will indeed enforce their law.

5. In communication No. 692/1996 evidence was provided by the State party that other embassies in Iran, one of which handles a high volume of asylum cases, had informed the State party's embassy that no individuals who had been deported to Iran after serving a prison sentence in another country for drug offences were subject to rearrest and retrial. As opposed to this positive evidence that persons in a similar situation to the deportee had not in fact been charged in Iran, the evidence presented by the State party in the present communication is negative: the State party knows of no cases in which a person in similar circumstances to T. has been charged and executed on return to Malaysia. (para. 5.7 of the Committee's Views). Like the oral confirmation mentioned above this evidence is insufficient to refute the assumption that Malaysian law will be applied in T.'s case.

6. In the light of the above we are forced to conclude that there is a real risk that T. will face a death sentence if he is deported to Malaysia. We are therefore of the opinion that by deporting T. the State party would violate its obligation to ensure his right to life under article 6 of the Covenant.

(Signed) E. KLEIN

(Signed) D. KRETZMER

(Original: English)

V. Communication No. 732/1997, B. Whyte v. Jamaica* (adopted on 27 July 1998, sixty-third session)

Submitted by:	Beresford Whyte (represented by Ashurst Morris Crisp of London)
Victim:	The author
State party:	Jamaica
Date of communication:	23 December 1996 (initial submission)
Date of admissibility decision:	5 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 1998,

Having concluded its consideration of communication No.732/1997 submitted to the Human Rights Committee by Beresford Whyte, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Beresford Whyte, a Jamaican citizen, born on 24 July 1969, currently detained on death row in St. Catherine's District Prison, Jamaica. He claims to be a victim of a violation by Jamaica of articles 7, 9, 10 and 14 of the Covenant. He is represented by Ashurst Morris Crisp, a law firm in London, England.

Facts as submitted by the author

2.1 In the night of 27 to 28 November 1990, Roy Cockburn, a shopkeeper, was attacked by two men, wearing masks, who broke into the room where he was sleeping. His twelve year old son Buntin witnessed the murder. One of the men grabbed the son and his mask fell off. The son recognised him as 'Billy'. After a brief exchange, the men took the money the father had brought with him from the store and left. The father died from his injuries later that day. Warrants for the author's arrest were issued on 28 November 1990.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of individual opinions by Committee members Cecilia Medina Quiroga and Martin Scheinin is attached.

2.2 The author, who is also known as 'Billy', was stopped by the police on 4 January 1992 and formally arrested on 13 January 1992. He was cautioned and informed that there was a warrant for his arrest for burglary, robbery and murder. He was tried before the Home Circuit Court, Kingston, on 16 and 17 February 1995. On 17 February 1995, he was found guilty of capital murder and sentenced to death. His appeal was heard on 26 September 1995, and dismissed by judgement of 23 October 1995. His application for special leave to appeal was dismissed on 14 November 1996. All available domestic remedies are said to have been exhausted, since the author does not have the means to file a constitutional motion, as the State party does not make any legal aid available for that purpose.

2.3 At trial, the author was identified by Buntin, who claimed that he had been able to recognise the author by means of a nearby street light, that he used to live nearby and that he knew him. The Prosecution also relied on an unsworn oral statement made by the author upon arrest, indicating that he got $13,000 and that he did not do it alone.

2.4 At trial, the author gave an unsworn statement in which he denied having been involved with the murder. The defence claimed that the identification by Buntin was mistaken.

The complaint

3.1 The author claims that he did not have a fair trial. In this connection, it is said that the judge during his summing-up introduced an issue which had not been raised during the hearing, namely whether Buntin's account of what happened was reality or the product of his imagination. It is stated that this was not the defence case, which was based on mistaken identity. According to counsel, because of this, the issue became one of credibility, not of accuracy.

3.2 Further, the author claims that he is a victim of a violation of article 14, paragraph 3(b)&(d), because of the way his defence was conducted at trial. It is submitted that at trial, the author was assigned senior and junior counsel. The author states that he never saw this counsel prior to the trial, and that he was represented by two other lawyers at the preliminary hearing. When the trial began on 16 February 1995, senior counsel was not present apparently because he had another hearing. Junior counsel, however, stated that she was prepared for the trial, subject to an hour to take some instructions. After the adjournment, the trial proceeded. The author states that junior counsel only had three and a half years experience, whereas it is usual in Jamaica that the defence of a capital murder case should not be undertaken by someone with less than five years of experience. He points out that the trial was unusually swift. The prosecution's case began at 12.09 am. and was completed at 3.32 pm. The Summing-up followed the next day, and the jury took only seventeen minutes to deliberate. The author claims that he was deprived of effective representation because junior counsel did not have enough experience and because no application was made for an adjournment to seek the services of senior counsel.

3.3 In this context, the author points out to mistakes made by his defence counsel. The author claims that junior counsel refused to request an adjournment in order to receive instructions. She failed to call him to give sworn evidence, and failed to investigate, interview or call defence witnesses who would have supported the author's alibi, in violation of article 14, paragraph 3(e). The author also claims that the cross-examination of witnesses was wholly inadequate, and that Buntin's evidence at trial was inconsistent with his previous statement to the police, with regard to the lighting and the masks, but that counsel failed to deal adequately with these inconsistencies. It is also stated that the dock identification of the author was inappropriate in view of the time lapse between the murder and the trial, and that counsel failed to object. Because of this, it is submitted, the Prosecution's case appeared stronger than it was and counsel failed to redress this by her closing speech, which lasted only seven minutes. It is argued that the cumulative effect of the errors committed by counsel render the conviction unsafe.

3.4 The author further claims that he is a victim of a violation of articles 7 and 10 of the Covenant. He states that he was beaten with a baton and strips of tyre by two police officers after his arrest, in order to make him sign a caution statement, which the author refused. He states that he lost three teeth in the process, but was never taken to a doctor. He states that he complained about this to the judge at the preliminary hearing, but that nothing was done about it. He further claims that he was kept in a very small cell with seven other men while in pre-trial detention. He was not given a slop bucket and had to sleep on a piece of card board.

3.5 The author further states that he was only taken before a judge to be formally charged three weeks after his arrest. This is said to be in violation of articles 9, paragraphs 2 and 3, and 14, paragraph 3(a). He further states that he had no access to a lawyer for the first year of his pre-trial detention and that only then a lawyer was assigned to him. This is said to be in violation of article 9, paragraph 4.

State party's submission and author's comments

4.1 By submission of 10 March 1997, the State party addresses the merits of the communication, in order to expedite the examination of the case.

4.2 With regard to the author's claim that the judge's instructions to the jury were erroneous, the State party submits that a careful reading of the trial transcript shows that the author's claim is factually incorrect. Moreover, the State party refers to the Committee's jurisprudence that the judge's instructions are best left to the consideration of the Court of Appeal. It is submitted that there are no reasons to depart from this principle in the present case.

4.3 With regard to the conduct of the author's legal aid attorneys, the State party refers the Committee to the trial transcript which shows that the author's allegations are inadequate and that counsel did cross-examine the witnesses adequately. Moreover, the State party submits that the attorney who represented the author at the trial sworn an affidavit in which she denies that the author instructed her to call alibi evidence. The State party thus denies that there has been a breach of the Covenant for which it can be held responsible. It argues that it is the duty of the State to appoint competent counsel to represent the accused and that the manner in which counsel conducts the case is not the responsibility of the State. Furthermore, the State party maintains that counsel did conduct the defence competently.

4.4 With regard to the alleged beatings by the police, the State party notes that the author did not bring this fact to the attention of the Court and of his attorney. In the absence of any evidence to support the author's allegation, the State party denies that this incident occurred.

4.5 The State party denies that the author was not informed of the charges against him. It further submits that the author had legal representation at every stage of the proceedings against him, and that there is thus no substantiation that he was denied access to a lawyer.

4.6 In addition, the State party points out that it would have been open to the author to bring an application to the Governor-General under section 29(1) of the Judicature Act, to request him to use his discretion to refer the case back to the Court of Appeal. It explains that the question of legal aid for these applications is considered on a case by case basis. In the instant case, the author had indicated an intention to make such an application, and he had to do so before 3 January 1997. However, he failed to complete his application despite reminders sent to the Jamaica Council for Human Rights which was acting on his behalf. The State party notes therefore that the author has failed to exhaust domestic remedies, but does not pursue the point in the instant case, without prejudice to any future communications.

4.7 Finally, the State party takes issue with the way in which London counsel for the author questions the competence and integrity of the counsel who represented the author at trial in Jamaica.

5.1 In his comments, counsel for the author maintains that the trial transcript shows major shortcomings in the summing up. With regard to the State party's arguments that this issue is better left to the Court of Appeal, counsel submits that this was done, but that the Court found that this ground was without merit. Counsel argues that it is proper for the Committee to consider the issue in so far as it may constitute a breach of the Covenant.

5.2 With regard to counsel at trial, it is submitted that she was incompetent in that she failed to develop discrepancies that came up in cross-examination, and that she failed to examine the alleged admissions by the author to the police, the underlying robbery and the forensic evidence. With regard to the trial counsel's sworn statement, it is submitted that it shows that she refused to seek an adjournment, because in her opinion, it was not necessary for the preparation of the defence and she saw it as a malingering tactic. According to the author's present counsel, no competent counsel could have refused to ask for an adjournment on behalf of their client. He further challenges the credibility of the sworn statement. Finally, he invites the State party to show how it fulfilled its duty to appoint competent counsel in the instant case. It is reiterated that the practice in Jamaica is not to appoint any counsel in a murder case with less than five years experience and that the author's counsel at trial had no more than three and a half years of experience.

5.3 With regard to the alleged beatings by the police, it is submitted that the author brought this to the attention of the judge at the preliminary hearing but that no action was taken.

5.4 Counsel reiterates that the author was not informed in detail of the charges against him and that if he was informed at all, that this was insufficient to comply with article 9, paragraph 2, of the Covenant. With regard to access to counsel, it is submitted that the State party has not sufficiently investigated the allegations and that its denial is too general in character.

6.1 In a further submission, dated 22 December 1997, counsel for the author submits that the author has obtained new evidence which, if place before the jury at trial, would have cast significant doubt on the credibility of the prosecution's key witness and the strength of the identification evidence. The evidence consists of two photographs purported to show that no street light was placed outside Cockburn's house at the time of the murder. Counsel recalls that at trial, the street light was established as the only light source by which the witness had identified the author. He adds that the absence of a street light has been confirmed by a member of the author's family. Counsel argues that if he had had sufficient access to his legal representatives before the trial, this evidence could have been investigated and brought before the court. The inability to do so is said to constitute a violation of article 14, paragraph 3(b).

6.2 Counsel further claims that the author is allergic to the dust and the lime paint on the walls of St. Catherine prison, which provokes burning of his eyes and asthma. In May 1997, the author was referred by the prison doctor to a specialist who indicated that his eyes required urgent treatment. However, the author has since not been able to see the specialist for lack of manpower in the prison.

6.3 Counsel further claims that on 5 March 1997, the author was beaten and his belongings burned following an escape attempt by four other death row prisoners. He and other inmates were allegedly beaten for one hour and thirty minutes by warders using clubs. Despite his request, the author was not taken to a hospital afterwards, although he was bruised and had a wound which bled profusely.[1] It is alleged that the prison doctor confirmed that the violence used by the warders was excessive and unnecessary. On 7 March the author was beaten again and punched in the face, after he had pointed out the warder who had burned his belongings. It is submitted that the author now lives in a constant fear of being beaten. In substantiation of his fear, reference is made to other incidents in the prison, such as the riots between 20 and 23 August 1997, during which sixteen prisoners died.

6.4 Counsel also submits that the conditions of detention are inhumane and degrading. It is submitted that there are no toilet facilities and no real bathroom facilities on death row. In order to wash, prisoners obtain buckets of water. The wash room has no door and the washing can thus be observed by all passers by. The pit in which toilet buckets are being emptied is next to the author's cell. It is foul smelling, infested and unhygienic. The food is said to be almost inedible and provided irregularly. As a result, the author suffers vomiting two or three times a week, sometimes mixed with blood. It is stated that he does not get more than one litre water a day, and that, following the incident of 5 March 1997, he is now limited to twenty to forty five minutes per day outside his cell. It is said that the author's cell is small (9 by 6 feet), dark and badly ventilated.

6.5 Counsel notes that the Governor-General of Jamaica can exercise the prerogative of mercy for anyone sentenced to death. According to counsel, the criteria the Governor-General uses are unclear. In this connection, it is submitted that he always exercises his prerogative of mercy for women condemned to death in Jamaica, whereas mercy has been shown rarely in respect of men. This is said to constitute a violation of article 3 of the Covenant[2].

6.6 Counsel also invokes a violation of article 17 of the Covenant, since during the incident of 5 March 1997, his personal belongings were burned on the instructions of the commissioner. These belongings included his legal documents, his mattress, personal letters, clothes and toiletries. According to counsel, the author was told that he would have to pay a warder in order to send letters.

6.7 Counsel also states that he sent a new set of legal documents to the author via the Jamaica Council for Human Rights. These documents were taken to prison and it was asked that they be passed to the author. According to counsel, this never happened. A second set of documents were then directly sent to prison and were received.

6.8 Finally, counsel claims that no rehabilitation programme has been undertaken in respect of the author or in respect of any other prisoner on death row and that this is in violation of article 10, paragraph 3..

Facts and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes that the State party has forwarded comments on the merits of the communication so as to expedite the procedure and that it has not challenged the admissibility of the communication. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met.

7.4 The author has claimed that he was denied access to a lawyer for the first year of his detention, since no lawyer was assigned to represent him. The State party has stated that the author had legal representation at every stage of the proceedings. The Committee notes that it does not appear from the information before it that the author had requested to see a lawyer and that this was refused, nor has the author claimed that he had no legal repesentation at the preliminary hearing. The Committee considers therefore that the author has failed to substantiate his claim, for purposes of admissibility, and that the claim is inadmissible under article 2 of the Optional Protocol.

7.5 The author has claimed that he was beaten by two police officers in order to make him sign a confession statement, which he refused. He states that he mentioned this to the judge at the preliminary hearing, but that no action was taken. The Committee considers that in view of the fact that this claim was raised neither at the trial nor in any other appropriate domestic proceeding, the author has failed to exhaust all domestic remedies available to him. This part of the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.6 With regard to the author's claim that the judge's instructions to the jury were inadequate, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee but for appellate courts of States parties to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions were manifestly arbitrary or amounted to a denial of justice. The Committee notes that the author's submissions in relation to his claim do not indicate that the trial was manifestly tainted by arbitrariness or amounted to a denial of justice. Accordingly, he has failed to substantiate his claim, for purposes of admissibility, and this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.7 The Committee considers that counsel has failed to substantiate, for purposes of admissibility, his claim under article 26 of the Covenant in respect of the granting of pardon by the Governor-General, his claim under article 17, and his claim under article 10, paragraph 3. These claims are therefore inadmissible under article 2 of the Optional Protocol.

8. The Committee considers that the author's remaining claims are admissible and proceeds, without further delay, to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

9.1 The author has alleged that he was not charged until three weeks after his arrest, when he was first brought before a judge. The Committee notes that the State party has denied that he was not promptly informed of the charges against him, but has not refuted that there was a delay of three weeks in bringing him before a judge. The Committee refers to its General Comment on article 9[3] and its jurisprudence under the Optional Protocol, according to which delays in bringing an arrested person before a judge should not exceed a few days. A delay of three weeks cannot be deemed compatible with the requirements of article 9, paragraph 3. In this context, the Committee also considers that the author's pre-trial detention of three years constitutes, in the absence of adequate explanations from the State party or other justification discernible from the file, a violation of his right under article 9, paragraph 3, to be tried within a reasonable time or to be released and also amounts to a violation of article 14, paragraph 3(c).

9.2 The author has claimed that he was deprived of effective representation at the trial because he was represented by an inexperienced junior counsel who failed to follow his instructions and made mistakes in the presentation of the defence. The Committee notes that counsel was granted an adjournment at the beginning of the trial in order to take instructions from the author and that neither she nor the author requested additional time to prepare the defence. There is further no indication that counsel's decision not to call alibi witnesses nor to request the author to give sworn evidence was not made in the exercise of her professional judgement. In this context, the Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the Committee does not show that this was so in the instant case and consequently, there is no basis for a finding of a violation of article 14, paragraphs 3(b), (d) and (e).

9.3 The State party has not contested the author's claim that during his pre-trial detention he was kept in a very small cell with seven other men, and that he had to sleep on a piece of cardboard. In the absence of a reply from the State party, the Committee finds that the conditions of pre-trial detention as described by the author constitute a violation of article 10, paragraph 1, of the Covenant.

9.4 Counsel has claimed that the author is allergic to dust and to the paint used in St. Catherine Prison and that his allergy provokes attacks of asthma and burning eyes, for which he does not receive any treatment. He has also described the conditions of detention on death row as inhumane and degrading. Finally, he has claimed that the author was beaten on 5 March 1997 and again on 7 March 1997, and that he did not receive medical attention for his injuries. The State party has not answered to any of these allegations. In the absence of any information from the State party, due weight must be given to

the author's claims. The Committee considers that the treatment to which the author has been subjected and the conditions of detention described by him, constitute a violation of articles 7 and 10, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 9, paragraph 3, 10, paragraph 1, and 14, paragraph 3(c), of the International Covenant on Civil and Political Rights.

11. The Committee is of the view that the State party is under an obligation, under article 2, paragraph 3(a), of the Covenant, to provide Mr. Beresford Whyte with an effective remedy, including commutation and compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] From a report of Jamaica Council for Human Rights it appears that the author's detailed affidavit concerning the incident was being brought before the Inter-American Commission.

[2] Nowhere in the communication has it been indicated that the author applied for mercy to the Governor General and that this was refused.

[3] General Comment 8 [16] of 27 July 1982, para. 2.

APPENDIX

Individual opinion by Ms. Cecilia Medina Quiroga (dissenting)

1. I regret to dissent from the majority decision with regard to paragraph 7.5 of these Views, where the Committee has declared inadmissible the complaint of Mr. Whyte that he was beaten by two police officers in order to make him sign a confession statement, which he refused. The reasons given by the Committee for this decision are that since the "claim was not raised at the trial nor in any other appropriate domestic proceeding", the author has failed to exhaust all domestic remedies available to him. It is clear that the matter was not raised during the trial because the author never signed a confession statement. As to other appropriate domestic remedies, it is my opinion that whenever there is an allegation of ill-treatment, it is for the State party to put in motion the procedure to investigate these types of violations, as has been said so often by this Committee. A further objection to the inadmissibility decision is based on the fact that the requirement of exhaustion of domestic remedies exists for the benefit of the State: international law always gives the State the possibility to deal first with the matter and correct any incompatibilities of any State organ's conduct with the international obligations of the State. This being the case, the State has to invoke the non-exhaustion of remedies when it finds that it should have been given the opportunity of examining the matter at a domestic level. If it does not do this, on the first occasion, it is to be understood that it has waived its right. In the present case, the State party indicated that it would address the merits of the communication in order to expedite consideration of the case (para 4.1), and proceeded to deal with the substance of this particular complaint denying that any incident of beatings had occurred (para 4.4), thereby granting competence to the Committee to deal with the merits of this particular complaint without domestic remedies - if any existed - having been exhausted. In this situation, it is my opinion that the Committee cannot base its inadmissibility decision on the failure to exhaust domestic remedies.

2. I join Mr. Scheinin's dissent with regard to the inadmissibility decision of the author's complaint under article 17 of the Covenant as stated in para 7.7 of these Views.

(Signed) Cecilia MEDINA QUIROGA

(Original: English)

Individual opinion by Mr. Martin Scheinin (dissenting)

While I agree with the Views of the Committee as to the findings of violation and the remedy, I do believe that the claims referred to in paragraphs 7.4 and 7.5, as well as the claim related to article 17 mentioned in paragraph 7.7 should not have been declared inadmissible. In my opinion, these three claims are admissible and all indicate violations of the Covenant.

Ad para. 7.4. In relation to the author's claim of a violation of article 14 (fair trial) because he was denied access to a lawyer for the first year of his detention, I wish to refer, firstly, to the Committee's earlier case-law on the axiomatic necessity of proper legal representation at all stages of capital punishment cases (see, e.g., Frank Robinson v. Jamaica, Communication No. 233/1987, Carlton Reid v. Jamaica, Communication No. 250/1987, Aston Little v. Jamaica, Communication No. 283/1987, Leroy Simmonds v. Jamaica, Communication No. 338/1987, and Trevor Collins v. Jamaica, Communication No. 233/1987). Secondly, I wish to point out that the period to which the present claim relates is one of unlawful detention under article 9 of the Covenant, as is established in para. 9.1 of the Committee's Views. The violation of article 9 by holding a person in detention under a murder charge for a year before the commencement of the judicial proceedings related to this charge does not justify the failure to secure the assistance of a lawyer to him. As there was no other legitimate reason for the detention of the author during this period of time but the preparation of a trial against him, he should have been secured the assistance of a lawyer in order to prepare his defence.

Ad para. 7.5. As it is uncontested that the author raised at the preliminary hearing the issue of being beaten by the police after his arrest and as the State party has not provided information on any investigation in this matter, this claim should have been declared admissible under article 7. As the author never signed a confession statement, the question whether he was beaten in order to make him sign such a statement was of no material relevance for the actual trial. Consequently, the fact that the incident was not raised at trial should not be held against the author. In the absence of explanations from the State party, a violation of article 7 should have been established.

Ad para. 7.7. It may well be that counsel to the author has sought to prolong the consideration of the case before the Committee by submitting additional claims at a rather late stage of the proceedings. Procedurally, however, the decision by the Committee to deal jointly with admissibility and merits must allow for new claims after the first submission by the State party as there is no admissibility decision that would define the scope of the case. In substance, the new allegations under article 17, raised in counsel's submission of 23 December 1997 represent an extremely serious matter. They refer to the burning by prison warders of the author's personal belongings and legal documents, including the trial transcript and correspondence with counsel and the Committee, as well as to the failure of the prison authorities to deliver to the author a new set of documents sent to him by counsel. The legitimate aspiration of the Committee to deal with death row cases in an expeditious manner does not justify leaving even the slightest impression that the Committee would take lightly such barbaric action as these allegations describe. If the Committee felt that the failure of the State party to even comment counsel's new submission constituted an obstacle to proceeding to the merits of this new allegation, this part of the submission should have been registered as a new communication instead of declaring it inadmissible.

(Signed) Martin SCHEININ

(Original: English)

W. Communication No. 733/1997, A. Perkins v. Jamaica*
(adopted on 19 March 1998, sixty-second session)

Submitted by:	Andrew Perkins (represented by Allen & Overy a Law firm in London)
Victim:	The author
State party:	Jamaica
Date of communication:	20 December 1995 (initial submission)
Date of decision on admissibility:	19 March 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 July 1998,

Having concluded its consideration of communication No.733/1997 submitted to the Human Rights Committee by Andrew Perkins, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Andrew Perkins, a Jamaican citizen, awaiting execution in St. Catherine Adult Correctional Centre in Kingston, Jamaica. He claims to be a victim of a violation of articles 7, 10 and 14 of the Covenant. He is represented by Allen&Overy, a law firm in London, England.

Facts as submitted by the author

2.1 On 12 December 1995, the author was convicted of two charges of capital murder arising out of the deaths of William and Marian Burrell, on 20 March 1994, and sentenced to death. The Court of Appeal dismissed his appeal on 17 June 1996. His application for special leave to petition the Judicial Committee of the Privy Council was dismissed on 16 December 1996. With this, it is submitted, all available domestic remedies have been exhausted.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 At trial, the case for the prosecution was that on the morning of 20 March 1994, Mr. and Mrs. Burrell surprised an intruder at their shop. The intruder then attacked them with a knife, killing the woman on the spot. A witness testified that he had seen the author running out of the shop with a bloody knife in his hand. He had also seen Mr. Burrell leave, wounded at the throat, with a machete in his hand. According to a police officer, Burrell arrived at the police station with a wound in his throat and a machete in his hand, and told him that the author had killed Mrs. Burrell and cut his throat. Mr. Burrell later died in hospital from his wounds.

2.3 The author was arrested on 21 March 1994. On 22 March 1994, he gave a caution statement, in which he said that he hid in the shop in the evening of 19 March 1994 and that when he came out of his hiding place he saw Mrs. Burrell and stabbed her in the neck. Mr. Burrell then rushed at him with a cutlass, and the author cut him in the neck and ran away.

2.4 At the trial, the author gave an unsworn statement from the dock. He stated that he used to sell cocaine for Mr. and Mrs. Burrell. On 19 March 1994, he went to their shop around 9pm, as previously arranged. After he had waited some two hours for them to close their shop, an argument ensued about the money to be paid to the author. Mr. Burrell then stabbed the author in the lip, and when Mrs. Burrell rushed towards Mr. Burrell, she was accidentally stabbed in the throat. The author picked up the knife and stabbed Mr. Burrell who came at him with a machete.

The complaint

3.1 The author claims that on 21 March 1994, he was asked to sign a written statement of which he did not know the contents. He was threatened that he would be beaten and killed if he would not sign. When he refused to sign the paper he was taken back to his cell. The next day, he was beaten by police officers (whom he mentions by name) with batons. After 25 minutes, the author agreed to sign the paper. The author states that he wrote to the Ombudsman about this incident and that he received a reply in February 1996 that the matter was being investigated. He has not heard from the Ombudsman since. It appears from the trial transcript that the author's statement was admitted in evidence by the judge after a voir dire in which the author gave sworn evidence.

3.2 The author further claims that while awaiting trial he was held in a cell with 23 other people and that he had to stand most of the time because of lack of space. If he slept, it was usually on the floor. Since his conviction, he has been held in a single very small cell. He sleeps on a sponge and has to use a bucket as a toilet. He is not provided with reading material. He further states that he is being bullied by the warders who tell him that the hangman is on his way and that he will be the next to go to the gallows.

3.3 The author states that he did not meet his attorney until the third preliminary hearing and only once before trial. He did not have a chance to give his attorney any instructions and complains that he was often absent during the trial[1]. He also states that he had no opportunity to speak with his attorney outside the court during the trial and that the attorney did not visit the scene of the crime although he had asked him to. The attorney's attitude is said to constitute a violation of article 14(3)(b).

3.4 The author claims that the beginning of his trial was unduly delayed and that he spent one year and nine months in pre-trial detention. This is said to be in violation of article 14(3)(c) of the Covenant.

3.5 The author also claims that article 14(3)(e) was violated in his case, since he wanted to have his father called as a character witness but this was not done.

3.6 The author further claims that the trial judge failed to leave the issue of provocation to the jury. It is further stated that the trial judge erred fundamentally when he directed the jury to disregard the possibility of concoction with regard to the statement given by Burrell to the police officer. It is further submitted that the judge erred in admitting the author's caution statement as evidence.

State party's comments

4.1 By submission of 5 March 1997, the State party informs the Committee that it has no objection to the admissibility of the communication and that it will address the merits of the case.

4.2 As regards the author's allegation that he was beaten by the police, the State party notes that there is no indication of the outcome of the investigation by the Ombudsman. In the circumstances, the State party feels that it cannot accept responsibility for the alleged breach of the Covenant.

4.3 Concerning the author's complaints about his legal aid attorney, the State party maintains that once it has appointed competent legal counsel, it is not responsible for the manner in which a defence counsel represents his client. Consequently, the State party denies that a violation of article 14(3)(b) has taken place.

4.4 The State party denies that a period of one year and nine months between arrest and trial constitutes undue delay under article 14(3)(c), especially since a preliminary inquiry was held during that time.

4.5 The State party further states that the failure to call the author's father as a witness would only be a breach of article 14(3)(e) if agents of the State had prevented him from being called as a witness.

4.6 Concerning the author's allegations about the judge's instructions to the jury, the State party refers to the Committee's jurisprudence that review of judge's directions are best left to appellate courts. The State party submits that there is nothing in the instant case to justify an exception from that principle.

Counsel's comments

5.1 With regard to the author's allegation that he was beaten by the police, counsel recalls that although the author reported this to his attorney, the court and the Ombudsman, there has been no follow up. Counsel disagrees with the State party that this is indicative that no violation has occurred, but, on the contrary, may indicate that investigations have not yet been completed.

5.2 Concerning the legal representation at the trial, counsel submits that the State party is in prima facie breach of its duty to appoint competent legal counsel. He argues that the author's attorney was incompetent by reason of his failure to consult with the author and take his instructions, his repeated absences from the trial, his failure to call (character) witnesses and his failure to visit the scene of the crime. It is further submitted that the attorney's frequent absences from the trial, in effect, left the author unrepresented for periods during the trial and that the assistance given to the author was therefore neither adequate nor effective.

5.3 Counsel maintains that a delay of one year and nine months between arrest and trial constitutes undue delay in violation of article 14(3)(c) and, because of the author's youth, also a violation of article 10(2)(b).

5.4 Counsel reasserts that the failure by counsel to call the author's father as a witness constitutes a violation of article 14(3)(e).

5.5 Counsel also maintains that the judge's instructions to the jury constitute a violation of article 14(1), and in particular his failure to disallow the caution statement as evidence, taking into account the age of the author at the time of arrest and the absence of any independent adult to advise him.

5.6 Counsel points out that the author was born on 23 September 1976, and that he was thus 17 years and six months old at the time of his arrest. It is therefore submitted that the author's detention while awaiting trial, constituted a breach of article 10(2)(b), because as a minor he was kept with adults. It is also submitted that the long pre-trial detention was especially unacceptable in view of the author's age and also constituted a violation of article 10(2)(b).

5.7 Finally, it is submitted that, since the author was a minor at the time of the murders, the imposition of the death sentence against him was unlawful and in breach of article 6(5).

6.1 In a further submission, counsel argues that the failure of the author's legal representative at the trial to bring the author's age to the attention of the Court is a serious indication of the inadequate representation afforded to him. Counsel reiterates that it would be unlawful for the Jamaican government to execute the author given that he was a minor at the time the crime was committed.

6.2 Counsel further states that at least one letter which the author addressed to him has not arrived. It is said that this letter contained vital information about the author's correspondence with the Ombudsman concerning his treatment by the police. Counsel argues that if it were the case that the author's correspondence were being intercepted by the Jamaican authorities, it would be a serious breach of his right to consult with his solicitors.

The Committee's admissibility decision

7.1 At its 62nd session, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

7.2 The Committee noted that the State party had raised no objection to the admissibility of the communication. Nevertheless, it was the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol had been met.

7.3 With regard to the author's claim that the judge's instructions to the jury were inadequate, the Committee referred to its prior jurisprudence and reiterated that it was generally not for the Committee, but for the appellate Courts of States parties, to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions were manifestly arbitrary or amounted to a denial of justice. The Committee noted that the author's submissions in relation to his claim did not indicate that the trial was manifestly tainted by arbitrariness or amounted to a denial of justice. Accordingly, he had failed to substantiate his claim, for purposes of admissibility, and this part of the communication was inadmissible under article 2 of the Optional Protocol.

7.4 The author further claimed that his right to obtain the attendance and examination of witnesses was violated, because his lawyer failed to call his father as a character witness. The Committee referred to its considerations in the preceding paragraph and considered that there was no reason to believe that counsel was not using his best judgment. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considered that the author's remaining claims, that he was subjected to ill-treatment upon arrest, that the beginning of the trial against him was unduly delayed, that he did not have effective representation at trial, his complaint about the conditions of his detention both before and after this trial, and his claim that he was under 18 years of age when the crime was committed, were admissible and should be examined on the merits.

7.7 The Committee noted that the State party had forwarded comments on the merits of the communication in order to expedite the examination of the case. Nevertheless, the Committee considered that the information before it was not sufficient to enable it to adopt its Views at this stage. In this context, the Committee noted that the State party had offered no explanation about the conditions of detention in which the author claimed to have been held before trial, nor about the conditions in which he was currently being held. Nor had the State party provided information about the author's age at the time the crime was committed.

8. Accordingly, on 19 March 1998, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under articles 6, paragraph 5, 7, 9, paragraph 3, 10, paragraphs 1 and 2(b), and 14, paragraph 3 (b), (c) and (d), of the Covenant.

State party's observations and counsel's comments

9.1 The State party submits a copy of a birth certificate for Andrew Perkins, son of Ina Johnson and Hazeal Perkins, born in the parish of Clarendon on 23 September 1971. It also submits a copy of a school admission record for Andrew Perkins at Rock River School in Clarendon, which shows the date of birth as 2 September 1971, and the date of admission to school as 5 September 1977. The State party submits that it has made enquiries at the Rock Hall All Age School, but that there is no record of Andrew Perkins attending this school.

9.2 It appears from the means enquiry report, submitted on behalf of Andrew Perkins in substantiation of his request for legal aid, that he gives his date of birth as 23 September 1976. His parents' names are being given as Mirriam Pennant and Hazeal Perkins. It is stated that the author's parents separated shortly after his birth, that he grew up with his father and stepmother, and that he has seen his mother only once during his conscious years. According to the State party, enquiries at the Probation Office revealed that the author had stated that a birth certificate had been sent to the Jamaican Defence Force by him on his seeking to enlist therein. Enquiries at the Defence Force produced the birth certificate referred to above.

10.1 Counsel points out that the author gives his mother's name as Mirriam Pennant and that the birth certificate produced by the author shows that her name was Ina Johnson. The author further maintains that he attended Rock Hall All Age School from 1982-1986. Counsel refers to the legal aid report which states that the author did not attend school regularly, and suggests that this may be the explanation for the lack of record. Counsel refers to the application form for legal aid, on which the author gives his date of birth as 23 September 1976, and states that he does not consider the Andrew Perkins referred to in the birth certificate and the school admission record to be the same person as the author.

10.2 In addition, counsel notes that no action was taken at the time of the author's application for legal aid to protect the author, given the fact that he gave his date of birth as September 1976, which made him a minor at the time the crime was committed. He was brought to trial and sentenced as if he were an adult. According to counsel, the enquiries the State party has now made should have been made at the time that the author was committed for trial.

Issues and proceedings before the Committee

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 With respect to the author's claim that he was beaten and threatened by the police in order to make him sign a statement, the Committee notes that the issue was the subject of a voir dire, after which the author's statement was admitted by the judge, that it was before the jury during the trial, that the jury rejected the author's allegations, and that the matter was not raised on appeal. The Committee finds that the information before it does not justify the finding of a violation of any article of the Covenant in this respect.

11.3 The Committee notes that the trial against the author started in December 1995, one year and nine months after his arrest. Article 9, paragraph 3, entitles an arrested person to trial within a reasonable time or release. In the absence of a satisfactory explanation from the State party why the author, even if he could not be released on bail, was not brought to trial within a year and nine months, such a delay is unreasonable and constitutes a violation of article 9, paragraph 3, because he was remanded in custody. In the circumstances the Committee need not address the question of whether the delay also constitutes a violation of article 14, paragraph 3(c).

11.4 The Committee notes that the State party has failed to address the author's claim that he was kept in deplorable conditions of detention before his trial. In the absence of a reply from the State party, due weight must be given to the author's allegations to the extent that they are substantiated. The Committee finds that the conditions of pre-trial detention as described by the author constitute a violation of article 10, paragraph 1, of the Covenant.

11.5 The author has also claimed that he did not have enough time to prepare his defence, since he did not meet his lawyer until the third preliminary hearing and only once before the trial. In this context, the Committee reiterates its jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the principle of equality of arms. Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the defence. The determination of what constitutes 'adequate time' requires an assessment of the individual circumstances of each case. The Committee notes from the information before it that the author's lawyer did meet the author on at least two occasions before the trial. The material before the Committee does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence was inadequate. If counsel or the author felt inadequately prepared, it was incumbent upon them to request an adjournment. In the circumstances, there is no basis for finding a violation of article 14, paragraphs 3(b) and (d).

11.6 The author has claimed that he was born in September 1976 and under 18 years of age when the crime for which he was convicted was committed, and that the imposition of the death sentence against him is therefore in violation of article 6, paragraph 2, of the Covenant. The Committee notes that the State party has furnished a birth certificate and a school admission record on which the date of birth of Andrew Perkins is recorded as September 1971. Counsel has challenged these documents and argues that they do not relate to the author. He has, however, not provided any document invalidating the State party's assertion that Andrew Perkins was born in 1971. In this connection, the Committee notes that counsel has not challenged the State party's statement that this is the birth certificate that the author himself sent to the Defence Force when applying to enlist therein. The only document indicating the author's date of birth as September 1976 is the application for legal aid, which was filled out by the author himself and, although showing the author's belief at the time, has no probative value. The Committee observes that it is incumbent on the State party to make enquiries if any doubt is raised as to whether the accused in a capital case is a minor. In the instant case, however, the Committee finds that the author was not under 18 years of age at the time of the offence and there is no basis to find a violation of article 6, paragraph 5, of the Covenant.

11.7 The author has claimed that since his conviction he has been held in a very small cell with only a sponge to sleep on and a bucket as toilet. Furthermore, he states that he is being bullied by the warders. The author's claims have not been refuted by the State party, which remains silent on the issue. The Committee considers that the conditions of detention and the treatment as described by the author are in violation of article 10, paragraph 1, of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose violations of articles 9, paragraph 3, and 10, paragraph 1, of the Covenant.

13. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Andrew Perkins with an effective remedy, entailing compensation and commutation of his death sentence. The State party is under an obligation to ensure that similar violations do not occur in the future.

14. On becoming a State party to the Optional Protocol, Jamaica recognized the

competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] The trial transcript does not show that the attorney absented himself during the trial.

X. Communication No. 734/1997, A. McLeod v. Jamaica*
(adopted on 31 March 1998, sixty-second session)

Submitted by:	Anthony McLeod (represented by Kingsley Napley, London)
Victim:	The author
State party:	Jamaica
Date of communication:	16 January 1997 (initial submission)
Date of decision on admissibility and adoption of Views:	31 March 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1998,

Having concluded its consideration of communication No.734/1997 submitted to the Human Rights Committee by Mr. Anthony McLeod, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Anthony McLeod, a Jamaican national awaiting execution at St. Catherine's District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7, 10, paragraph 1, and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. David Smythe of the London law firm Kigsley Napley.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omar El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion by one Committee member is attached.

The facts as presented by the author

2.1 Mr. McLeod was arrested on 27 December 1994 and charged on 3 February 1995. He was convicted on 22 September 1995 of the murder of one Anthony Buchanan and sentenced to death. He applied for leave to appeal against conviction and sentence to the Court of Appeal of Jamaica. At the hearing on 20 March 1996, legal aid counsel informed the Court that there were no grounds he could argue. On 8 July 1996, the Court of Appeal dismissed the author's appeal. The Judicial Committee of the Privy Council denied leave to appeal on 16 January 1997.

2.2 At the trial, the case for the prosecution was that on 3 December 1994, Anthony McLeod and a group of men robbed one Alvin Green on the Rio Magno Road, parish of St. Catherine. At the same time the deceased, an off duty police officer, came along the road. In order to avoid identification, the group killed him.

2.3 The prosecution's primary evidence was the testimony of a witness, one Calvin Wright, a cousin of the accused and friend of the deceased. The witness testified at trial that the author had confessed the murder to him on Tuesday 6 December 1994. McLeod had gone to his house at 14:00 and they were taking on the verandah, when Wright brought up the subject of the death of their mutual friend Buchanan saying: " Boy what a was dem kill Anthony". The author said: "A the said thing, me hear you know". At this time the witness' brother Garnett Wright walked into the house. The author then said "Between you and me Junior (name by which the witness is also known) you know sey a mi kill him". The author then told Wright that he had gone to the country to hold up a lady, and met a man in the dark; he robbed him of a one hundred dollar bill. Then a big man had come along the road. McLeod and another man forced this man to the ground. They searched the man's bag and saw a police uniform in it. The author said he cut the man's throat because he feared identification . He used the police uniform to wrap it around the face of the deceased and set it on fire.

2.4 The brother of the witness, Garnett Wright gave evidence to the effect that when he arrived at home on Tuesday 6 December 1994, and had seen the author speaking to his brother. Calvin Wright told his aunt of the conversation and reported it to the police. The witness admitted in cross-examination that he had heard about the death of the policeman on the radio, but denied that he had made up the confession as a result of what he had heard on the radio. He denied fabricating a case against the author because of ill feeling between the families.

2.5 Alvin Green gave evidence that on 3 December 1994, at about 8 pm, he was robbed of a one hundred dollar note by several men who held him up with a gun on the Rio Magno Road. He was unable to identify the men because of the darkness.

2.6 The prosecution further relied on medical evidence indicating that the cause of death of the deceased had been multiple injuries caused by a sharp instrument like a knife. There were first and second degree burns on the whole of the right side of the body, consistent with the assumption that the deceased was first killed then burned having used what appeared to be a policeman's uniform to set the body a light.

2.7 On trial, Mr. McLeod stated that he had not been in the area at the time of the crime; he admitted having gone there, on a later day. He claimed that he was set up because of a family feud. His father testified to the effect that a family feud between his family and that of the witness indeed existed.

The complaint

3.1 Counsel argues that the unsatisfactory aspects of the trial, in particular the misdirection by the judge to the jury on joint enterprise, the failure to give proper directions regarding evidence in general and, in particular the medical evidence and the confession, amount to a violation of article 14, paragraph 1.

3.2 It is contended that defence counsel only met with the author the day before the appeal hearing, and that he failed to take any instructions from him. At the hearing and without instructions defence counsel failed to advance and argue these trial defects before the Court of Appeal. The author by reason of the inadequate access to a lawyer was denied adequate preparation of his appeal, in violation of article 14, paragraphs, 1, 3 (d) and 5.

3.3 Counsel contends that defence counsel's failure to call the author's sister as a witness during the trial constituted a breach of article 14, paragraph 3 (e), of the Covenant.

3.4 It is further asserted that the detention regime at St. Catherine's District Prison constitutes a violation of articles 7 and 10, paragraph 1. Reference is made to reports by Human Rights Watch and Amnesty International, where it was observed, inter alia, that the prison holds more than twice the capacity for which it was constructed in the nineteenth century, and that the facilities provided by the State are deficient: no bedding or furniture in the cells; no sanitation; no artificial lighting and only small air vents through which natural light can enter; limited employment opportunities for prisoners; and no doctor permanently attached to the prison, so that medical problems are generally treated by warders who receive very limited training. It is submitted that the particular impact of these general conditions upon the author are that he remains confined in a 2 metre square cell for twenty-three hours each day. He is isolated from other prisoners for most of the day, spends most of his waking hours in enforced darkness and has little to keep him occupied. He is not permitted to work or to educate himself.

State party's comments on admissibility and the merits

4.1 In a submission of 17 March 1997, the State party waives the right to address the admissibility of the communication and addresses the merits of the author's claims. On the alleged violation of article 14, paragraph 1, it argues that the way in which the judge directed the jury on the issue of joint enterprise, medical evidence to corroborate a confession, and the relevance of the evidence of a witness, following the Committee's jurisprudence is a matter which was properly left to the Court of Appeal to evaluate.

4.2 On the alleged violation of article 14 paragraphs, 3 (d) and 5, because of the conduct of legal aid counsel on appeal, the State party contends that it cannot be held accountable for these actions of counsel. Reference is made to the Committee's jurisprudence. With respect to the alleged violation of article 14, paragraph 3 (e), because of the failure of defence counsel to call an alibi witness, the State party relies on the same reasoning to reject any breach of the Covenant.

Admissibility consideration and examination of merits

5.1 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in January 1997, the author has exhausted domestic remedies for purposes of the Optional Protocol. In this context, it notes that the State party has waived its right to address the issue of admissibility of the complaint and has proceeded to comment on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes.[1] The Committee further notes that counsel for the author has agreed to the examination on the merits of the case at this state.

5.2 The Committee finds that no obstacles to the admissibility of the communication exist and accordingly proceeds, without further delay, to an examination of the substance of these claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

6.1 The author claims that he was not properly represented by his legal aid counsel on trial, as counsel did not call an alibi witness, in violation of article 14, paragraph 3 (e). The Committee recalls its prior jurisprudence that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is nothing in the record to suggest that counsel was not using his best judgment; he did call one other alibi witness, (the author's father). The Committee considers that there is no basis for holding the State party accountable for counsel's actions, and consequently finds that there has been no violation of article 14, paragraph 3 (e), of the Covenant.

6.2 The author alleges that there were irregularities in the court proceedings, improper instructions from the judge to the jury on the issues of joint enterprise, medical evidence to corroborate a confession, and the relevance of the evidence of a witness. The Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee suggest that the issues raised by the author may have pointed to deficiencies in the evidence. On examination, however, it does not appear to the Committee that any of these alleged deficiencies were arbitrary or that they violated the obligation of impartiality.

6.3 With regard to the author's claim of deficient representation on appeal, he claims that although consulted before the appeal he was not aware that his legal aid representative would argue no grounds of appeal and that this was not in accordance with his instructions to counsel. The State party does not refute this claim but contends that it is not accountable for the actions of counsel. The Committee notes from the information before it that the Court of Appeal examined the case even though counsel had conceded he could find no grounds to argue. The Committee is of the view, however, that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's rights under article 14, paragraph 3 (b) and (d), have been violated.

6.4 With regard to the author's claim that his conditions of detention at St. Catherine's District Prison, where he has been held on death row since his conviction, constitute a violation of articles 7 and 10, paragraph 1, the Committee notes that the author has made specific allegations, about the deplorable conditions of his detention. He claims that he is confined to a 2 metre square cell for twenty-three hours each day, and remains isolated from other men for most of the day. He spends most of his waking hours in enforced darkness and has little to keep him occupied. He is not permitted to work or to undergo education. The State party has not refuted these specific allegations. In these circumstances, the Committee finds that confining the author under such circumstances constitutes a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person contrary to article 10, paragraph 1, of the Covenant.

6.5 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In this case, the author was denied an opportunity to appeal his case since his counsel did not inform him that he was not going to forward any grounds of appeal. This means that the final sentence of death in Mr. McLeod's case was passed without having met the requirements for a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose violations of article 10, paragraph 1; and 14 paragraph 3(b) and (d), and consequently of article 6 of the Covenant.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing a new appeal or should the State party not be in a position to comply with this recommendation, his release.

9. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subjected to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] See Views on communication No. 606/1994 (Clement Francis v. Jamaica), adopted 25 July 1995, para. 7.4.

APPENDIX

Individual opinion by Mr. Martin Scheinin

While I associate myself with the Committee's views as regards all the findings on violations of the substantive articles of the Covenant, I wish to clarify an issue related to the obligation of the State party to remedy the violations of the Covenant to the author.

The practice of the Committee in relation to the remedy has undergone a process of evolution during the twenty years of the Committee's work under the Optional Protocol. It is a legal obligation of a State party under article 2, paragraph 3, of the Covenant to ensure that any person whose rights protected by the Covenant have been violated "shall have an effective remedy". In addition to this general provision, article 9, paragraph 5, establishes a right to compensation for arrest or detention unlawful either under the Covenant or domestic law. Both of these obligations stem directly from the Covenant and not from the Committee's mandate to issue, when performing its functions under the Optional Protocol, interpretations or recommendations on what measures would in each case constitute an effective remedy. In its very first views the Committee did not specify the nature of the remedy even though the case clearly fell under article 9, paragraph 5 (see the views in *Moriana Hernández Valentini de Bazzano et al. v. Uruguay*, Communication No. 5/1977). However, already in its second case the Committee specified that compensation was the appropriate form of remedy in a case where a violation of article 9 was established (see, *Edgardo Dante Santullo Valcada v. Uruguay*, Communication No. 9/1977). In later years the Committee has recommended compensation as the remedy or as a part of the remedy in many cases in which a violation of only other articles than article 9 have been found. The first such recommendations of compensation were issued in the Committee's views adopted in its 15th session (1982) in the cases of *Pedro Pablo Camargo v. Colombia* (Communication No. 45/1979) and *Mirta Cubas Simones v. Uruguay* (Communication No. 70/1980), after finding a violation of article 6, and articles 10 and 14, respectively.

It is to be expected that the evolution towards more specific pronouncements on the remedy will continue. It should, for instance, be welcomed by the Committee that authors or counsel specify, when sending submissions to the Committee, the amount of compensation they consider appropriate for the violation suffered, and that State parties present their observations on such claims when answering to communications. This would enable the Committee to take the next logical step in addressing the issue of remedies, namely, to specify the amount and currency of compensation in those cases where compensation is seen by the Committee to be an appropriate remedy. This would strengthen both the nature of the Optional Protocol procedure as an international recourse to justice and the Committee's role as the internationally authoritative interpreter of the Covenant.

In death penalty cases the Committee has after finding a violation of the Covenant often, but not always, recommended either commutation or release as an effective remedy. Both of these remedies make it clear that when a person has been sentenced to death in violation of the Covenant or treated contrary to the provisions of the Covenant while awaiting execution, the remedy should include an irreversible decision not to implement the death penalty. The Committee has been particularly clear and consistent on this point when the requirements of a fair trial under article 14 have been found to be violated. In several cases, including the present one, the Committee has explicitly stated that the imposition of the death penalty after a procedure that does not meet the requirements of article 14 entails a violation of the right to life, i.e. article 6 of the Covenant.

In cases involving a violation of articles 7 and/or 10 of the Covenant in relation to persons on death row, the Committee has not been consistent in formulating its specific recommendations as to the remedy. This cannot, of course, alter the main rule that the victim is entitled to an *effective* remedy under article 2, paragraph 3, of the Covenant. In the final paragraph of the views in its most important case related to the death penalty, the case of *Earl Pratt and Ivan Morgan v. Jamaica* (Communication Nos. 210/1986 and 225/1987) the Committee gave a clear and convincing answer to the question what constitutes "effective remedy" to a person awaiting execution:

"Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party *of any of its obligations under the Covenant*. The Committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 *are entitled to a remedy; the necessary prerequisite* in the particular circumstances is the commutation of the sentence." (italics added)

In the light of what has been said above the pronouncement in paragraph 8 of the Committee's views in the present case is not as clear as I would have hoped. In accordance with article 2, paragraph 3, the Committee states that the remedy to be provided to the author must be an effective one. After that reaffirmation of the legal obligation the State party has directly under the Covenant the Committee, however, indicates that in the present case an "effective remedy" would mean either a new consideration of the appeal or the author's release. In the specific context of the present views being issued after Jamaica's withdrawal from the Optional Protocol procedure has taken effect in accordance with article 12 of the Optional Protocol, I would have seen it more appropriate to state that the author is entitled, as an immediate and irreversible measure, to the commutation of his death sentence, and thereafter to either a new appeal or release. This would have made it more clear than the Committee's formulation of paragraph 8 of the views that an "effective remedy" in a case in which a violation of article 10, paragraph 1, article 14, paragraph 3 (b) and (d), and of article 6 is found must include, first and foremost, absolute protection of the victim against execution. As the Committee's views in *Pratt and Morgan* suggest, this must in my opinion be the understanding of what constitutes an effective remedy in *every* case where a violation of the Covenant is established in relation to a person awaiting execution. To a person on death row it is a precondition for any other remedy being "effective" that he or she can preserve his or her life.

(Signed) M. SCHEININ

(Original: English)

Y. Communication No. 749/1997, D. McTaggart v. Jamaica*
(adopted on 31 March 1998, sixty-second session)

Submitted by:	Deon McTaggart (represent. by Mr. David Stewart of S.J. Berwin & Co., London)
Victim:	The author
State party:	Jamaica
Date of communication:	10 April 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1998,

Having concluded its consideration of communication No.749/1997 submitted to the Human Rights Committee by Mr. Deon McTaggart, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Deon McTaggart, a Jamaican national awaiting execution at St. Catherine's District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, 10, and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. David Stewart of the London law firm S.J.BERWIN & Co.

The facts as presented by the author

2.1 On or around 26 March 1993 Deon McTaggart was arrested by the police and taken to an unknown location. He was beaten unconscious by the police and sustained several injuries including the dislocation of his collar bone. He was told that one Mr. Davy wanted to see him. It appears that during the 1991 elections the author had denounced, to the police, that some of Mr. Davy's men had killed one Mr. Kerr.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omar El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Maxwell Yalden. The text of an individual opinion by one Committee member is attached.

2.2 The author regained consciousness during the night and managed to escape. His family moved him to St. Elizabeth, in the parish of Aberdeen, where he received medical attention. He remained in the parish until July 1993 when he left Jamaica.

2.3 Mr. McTaggart was sent back to Jamaica from Canada after his application for political asylum failed. He arrived in Jamaica, on 18 April 1994, was arrested at the airport and remanded into custody until his trial. He was convicted, on 12 April 1995, of the murder of one Errol Cann and sentenced to death. On 31 July 1996 the Court of Appeal of Jamaica refused leave to appeal against conviction and sentence. The Judicial Committee of the Privy Council dismissed the author's application for special leave to appeal on 20 March 1997.

2.4 At the trial, the case for the prosecution was that on 11 June 1993, Deon McTaggart and several other men shot Errol Cann in an ambush in St. Catherine, Spanish Town, while he was being driven to the bank to lodge the proceeds of the sales of his business.

2.5 The prosecution presented several witnesses, including one Dorothy Shim who was driving the car when it was shot at. She was unable to identify the assailants; however she stated that she was forced to slow down and eventually halt the car because she noticed a small boy pushing a cart out of the car's path. It was when the car stopped that Mr. Cann was shot at with what was described as a pump rifle. Another man clung to the car and eventually fell off when she accelerated the car to drive to the hospital.

2.6 David Morris a 14 year old, gave evidence that he had known the author for a period of 4 years, under the alias of "German". He testified that on 10 June 1993, he was kidnapped by the author and two other men, who threatened to kill him because his mother was a police informer. The following day he was taken to Market Street and forced to push a hand cart into the middle of the road. He was then dismissed by the men. Morris stated that he hid close by and saw the events. A car drove up to the cart and was forced to stop, one of the assailants took out a pump rifle from a paper bag and went to the passenger side of the car and shot the victim. The car accelerated, the author leapt on to it but fell off with the acceleration.

2.7 The prosecution further relied on medical evidence indicating that the cause of death of the deceased had been multiple injuries caused by gunshot wounds to the chest.

2.8 In a statement, given by the author to two Jamaican officers while he was held in detention in Canada, at the West Detention Centre in Toronto, which was introduced as evidence during the trial, McTaggart admitted to the alias "German".

2.9 On trial, Mr. McTaggart made an unsworn statement from the dock claiming that he had not been in the area at the time of the crime and denied that he was known as "German".

The complaint

3.1 On 18 April 1994, the author was sent back from Canada, and arrested on arrival in Jamaica. He appeared before the Gun Court on 26 April 1994. Counsel alleges that it was not until 11 May when he appeared before the Home Circuit Court, being first taken to the Gun Court again, that he was informed of the charges against him for the first time[1]. This is said to be in violation of article 9, paragraph 2, of the Covenant.

3.2 The author was arrested on 18 April 1994 and tried on 28 March 1995, this delay of 12 months in bringing him to trial and failing to release him on bail, is said to be an unreasonable and undue delay constituting a violation of articles 9, paragraph 3 and 14, paragraph 3 (a).

3.3 Counsel states that the author was not represented during the preliminary hearing. It is claimed that defence counsel only met with the author twice, each time for twenty minutes prior to the trial. He claims a further violation in that counsel failed to request an adjournment to consider with the author prosecution witness statements submitted without warning during the trial. It is contended that despite the author's wish that his counsel visit the scene of the crime, counsel failed to do so. The author by reason of the inadequate access to a lawyer was denied adequate time and facilities for the preparation of his case, in violation of article 14, paragraphs 1 and 3 (b) and (d).

3.4 Counsel argues that the author was denied a fair trial as there was extensive media coverage of the author's case. It is claimed that the extent of the coverage was such that the news even reached Canada, where the author was a resident in a detention centre, whilst applying for political asylum. Counsel argues that the presumption of innocence was further violated as the media coverage would have adversely influenced the jurors,[2] making it impossible for the author to have a fair trial.

3.5 Counsel further alleges that the author was denied a fair trial in that he was not correctly identified, since, on 11 May 1994, he was taken to the Gun Court, while on his way to the Circuit Court and placed in a small room, for police use, and pointed out by Morris the young witness. Counsel alleges that it was the police who pointed out the author to the witness before the witness identified him, this is said to constitute a violation of the author's right under article 14, paragraph 2.

3.6 Counsel argues that the unsatisfactory aspects of the trial, the misdirection by the judge to the jury on joint enterprise and the failure to give proper directions regarding evidence, rendered the trial unfair. In particular, he refers to the judge's instructions to the jury on how to interpret confrontation identification evidence. In this connection, counsel refers to the testimony of the witness Morris that had known the author for four years, whereas the judge in his summing up said they had known each other four months. This discrepancy is said to amount to a violation of article 14, paragraph 1. Furthermore, counsel argues that Morris' evidence could not be true, since he was in a reform school at the time and the author was in prison. It is further argued that the imposition of a sentence of death on the basis of an unsafe conviction constitutes a violation of article 6 of the Covenant.

3.7 It is claimed that defence counsel's failure to call the author's father as a witness during the trial constituted a breach of article 14, paragraph 3 (e), of the Covenant.

3.8 Counsel claims that the author was injured in 1993, his collar bone being dislocated, which has not been set back nor has he received any medical treatment. The conditions in his cell, prior to trial, were very poor; he was kept in a cell with a number of men, with no slops bucket, all this is said to be in violation of article 10, paragraph 1.

3.9 During his detention prior to trial the author shared a cell with all classes of prisoners, it is argued that his non segregation from convicted persons while awaiting trial, was in violation of article 10, paragraph 2, of the Covenant.

3.10 It is further asserted that the detention regime at St. Catherine's District Prison constitutes a violation of articles 7 and 10, paragraph 1. Since his conviction the author has been kept in a solitary cell, with only a foam mattress to sleep on, and a slops bucket for all sanitation which he may only empty twice a day. Intermittently his visitors are said to be turned away and when allowed in, it is only very briefly. On 4 March 1997, the author and several other death row inmates were severely beaten by warders and then five men including himself were forced into one cell. The wardens burnt the author's belongings including letters from his lawyers, trial transcript and copy of his petition to the Privy Council. The author was then again beaten.

3.11 The lack of social rehabilitation for prisoners, especially for those on death row, within the Jamaican penitentiary system is said to constitute a violation of article 10, paragraph 3, of the Covenant.

State party's comments on admissibility and the merits

4.1 In a submission of 12 June 1997, the State party waives the right to address the admissibility of the communication and addresses the merits of the author's claims. On the alleged violation of article 9, paragraphs 1 and 2, the State party denies that the author was not formally advised of the charges against him. In this respect, it is stated that the author was interviewed in Canada by a Jamaican police officer in connection with the murder of Mr. Cann, he was sent back to Jamaica and arrested for that offence, he appeared in Court and was remanded in custody for the same offence, consequently the State party contends that it is inconceivable that throughout this process the author was never formally charged.

4.2 With respect to the allegation that a period of 12 months between arrest and trial constitutes undue delay, the State party categorically rejects that 12 months to try someone, in any way constitutes a violation of articles 9, paragraph 3, and 14 paragraph 3 (a).

4.3 With respect to the allegation that the author was denied a fair trial, in violation of article 14, paragraph 1, due to the extensive pre-trial publicity, the State party denies that the publicity was so extensive that it made it impossible for the author to obtain a fair trial.

4.4 With respect to the allegation that the author was not represented at the preliminary inquiry the State party contends that since the author was joined by a "voluntary bill of indictment" issued by the Director of Public Prosecutions, there was no preliminary enquiry. Consequently, the author could not have been represented. The State party argues that the above procedure is one established under Jamaican law and does not constitute a breach of the Covenant.

4.5 On the rest of the alleged violations of article 14, paragraph 1, the

State party argues that they relate to the evaluation of facts and evidence, and considers that in accordance with the Committee's own jurisprudence these are matters which were properly left to the Court of Appeal to evaluate.

4.6 On the alleged violation of article 14, paragraph 3 (b), because of the conduct of legal aid counsel and the limited time he spent with the author prior to the trial, the State party contends that it has the responsibility to provide an accused person with competent legal counsel and not to obstruct them in the conduct of their case, and cannot therefore be held accountable for these actions of counsel.

4.7 With respect to the alleged violation of article 14, paragraph 3 (e), because of the failure of defence counsel to call a defence witness, or to request an adjournment in order to prepare cross- examination when evidence was introduced without warning, the State party relies on the same reasoning as above to reject any breach of the Covenant.

4.8 With respect to the allegations of violations of articles 7, and 10, paragraph 1, concerning the author's conditions of detention both before and after his conviction and in particular that he was denied medical attention for his dislocated collar bone. The State party recalls that by the author's own admission the injury occurred in 1993; that he was free during part of the time and then was in detention in Canada until April 1994. The State party rejects responsibility for any lack of medical attention that may have occurred, if any, during that period. With respect to the allegation that the author was beaten by wardens in March of 1997, the State party promised that the matter would be investigated.[3]

4.9 On the allegation that during his pre-trial detention the author was not segregated from convicted prisoners, in violation of article 10, paragraph 2, the State party contends that the author was held at Central Police Station and at the General Penitentiary. In this respect, it states that no convicted prisoners are held at Central Police Station, and that at the General Penitentiary convicted prisoners are separated from those awaiting trial, it rejects that there has been a violation of the Covenant.

5.1 Counsel reiterates the claims submitted in the original communication regarding: unfair trial; incompetence of counsel, for not calling witnesses and in the preparation of the author's trial, excessive publicity; undue delay; ill-treatment before and after conviction; non segregation from convicted prisoners while awaiting trial. Counsel points out that the State party has failed to address several of the allegations, in particular, those in respect of conditions of detention on death row, and that it has promised to investigate the allegations of beatings but has not hereto submitted any information.

5.2 He further argues that in respect of the non-segregation from convicted prisoners the State party has simply informed the Committee of the legal regulation, but has failed to address the author's specific situation, which did not follow the rule.

Admissibility consideration and examination of merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it its admissible under the Optional Protocol to the Covenant.

6.2 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial, since he only met with him for a short time prior to the trial and failed to follow his instructions in visiting the scene of the crime and did not call a defence witness in violation of article 14, paragraph 3 (b) and (e), the Committee recalls its prior jurisprudence where it has held that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his best judgment. The Committee finds that in this respect, the author has no claim under article 2 of the Optional Protocol.

6.3 With regard to the author's remaining allegations concerning irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of interpretation of confrontation identification evidence and the relevance of the evidence of a witness, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. McTaggart's trial suffered from such defects. In particular, it is not apparent that his instructions on how to interpret confrontation identification evidence given by the witness Morris, were in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 The Committee considers that the author has failed to substantiate, for purposes of admissibility, that he has been a victim of a violation of article 10, paragraph 3. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in January 1997, the author has exhausted domestic remedies for purposes of the Optional Protocol. In the circumstances of the case, the Committee finds it expedient to proceed with the examination of the merits of the case. In this context, it notes that the State party has waived its right to address the issue of admissibility of the complaint and has proceeded to comment on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes.[4] The Committee further notes that counsel for the author has agreed to the examination on the merits of the case at this stage.

7. The Committee accordingly, declares the remaining claims admissible and proceeds, without further delay, to an examination of the substance of these

claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 Article 9, paragraph 2, of the Covenant gives the right to everyone arrested to know the reasons for his arrest and to be promptly informed of the charges against him. Mr. McTaggart contends that he was not informed of the charges against him until he appeared before the Circuit Court on 11 May 1995, and that this was the first time he knew of the reasons for his arrest. The Committee notes from the material before it, submitted by the author's counsel, that Mr McTaggart saw a lawyer within the same week he was arrested, it was therefore highly unlikely that neither the author nor his Jamaican counsel were aware of the reasons for his arrest. In these circumstances and on the basis of the information before it the Committee concludes that there has been no violation of article 9, paragraph 2.

8.2 With regard to the author's allegation of excessive delay in the proceedings, the Committee notes that there was a delay of 12 months between the author's arrest, after his return from Canada, and his trial. While such a delay between arrest and trial in a capital case may not be desirable, the Committee does not on the basis of the material before it, conclude that there has been a violation of articles 9, paragraph 3, and 14, paragraph 3 (a).

8.3 With regard to the allegation that the author was not represented at the preliminary enquiry, in violation of article 14, paragraph 3 (d), the Committee notes that the author was brought before the Court on trial for murder by a judge and jury under regular procedures of the Jamaican legal system. He was found guilty by the jury who heard and assessed the evidence against him, and the case was reviewed by the Court of Appeal. The fact that he was joined by "a voluntary bill of indictment", on his return to Jamaica after the preliminary enquiry had already taken place for the rest of the co-accused, following an established procedure, would not necessarily invalidate the fairness of the trial. Furthermore, this matter was never raised before the Courts, either on trial nor on appeal. Consequently, on the basis of the information before it the Committee concludes that there has been no violation of the Covenant in this respect.

8.4 The author has claimed that he was denied a fair trial due to the extensive media coverage given to his case, which allegedly reached Canada. The Committee notes that from the material before it the coverage the case received in Canada was generated in Canada, since it referred primarily to the author having been arrested at Toronto airport trying to enter the country on false documents. Counsel has failed to provide the Committee with any material relating to media coverage in Jamaica. In the circumstances of the present case, and as far as concerns the possible effects of the media coverage of the trial, the Committee considers that there has been no violation of article 14, paragraph 1, of the Covenant.

8.5 The author has claimed that the conditions in his cell, prior to trial, were very poor; he was kept in a cell with a number of men, with no slops bucket. The State party has failed to address this allegation except in a very general manner. Consequently, the Committee considers that the author's rights as a person in detention have been violated, in breach of article 10, paragraph 1, of the Covenant.

8.6 With regard to the conditions of detention at St. Catherine's District Prison, the Committee notes that the author has made specific allegations, about the deplorable conditions of his detention. He claims that he is kept

in a solitary cell, with only a foam mattress to sleep on, and a slops bucket for all sanitation which he may only empty twice a day. Intermittently, his visitors are sent away and when allowed in it is only very briefly. The State party has not refuted these specific allegations. In these circumstances, the Committee finds that confining the author under such circumstances constitutes a violation of article 10, paragraph 1, of the Covenant.

8.7 The author has alleged that, on 4 March 1997, he and several other death row inmates were severely beaten by warders and then five men including himself were forced into one cell. Later, the warders burnt his belongings including letters from his lawyers, trial transcript and copy of his petition to the Privy Council. The Committee notes that the State party promised to investigate the matter. It considers that, in the absence of any information from the State party, the treatment described by the author constitutes treatment prohibited by article 7 of the Covenant, and is likewise in violation with the obligation under article 10, paragraph 1, of the Covenant, to treat prisoners with humanity and with respect for the inherent dignity of the human person.

8.8 The author has claimed that during his detention prior to trial he shared a cell with all classes of prisoners, and was not segregated from convicted persons. The Committee notes the information provided by the State party in that Jamaican legislation requires that persons awaiting trial be separated from convicted persons. However, the State party has explained that the author was held at Central Police Station and at the General Penitentiary, where convicted prisoners are separated from those awaiting trial. In light of the information the Committee concludes that the author has failed to substantiate his claims and consequently, there has been no violation of article 10, paragraph 2, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy including compensation. The Committee urges the State party to take effective measures to carry out an official investigation into the author's allegations of beatings by wardens and where appropriate, identify the perpetrators and punish them accordingly, and to ensure that similar violations do not occur in the future.

11. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subjected to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] The author filled in a questionnaire for his London counsel, in which he stated that he saw a lawyer within the same week in which he was arrested, on his return to Jamaica.

[2] The media coverage submitted by counsel refers solely to the information which appeared in Canada when the author was detained on arrival in Toronto for travelling with false documents. In a further submission counsel states that evidence of the media coverage in Jamaica is being sought, but nothing has been submitted to the Committee.

[3] To date 6 April 1998 no information has been received from the State party in this respect.

[4] See Views on communication No. 606/1994 (Clement Francis v. Jamaica), adopted 25 July 1995, para. 7.4.

Individual opinion (partly dissenting) by Mr. Martin Scheinin

On two important issues my position differs from those expressed in the Committee's views. One of them relates to the substance of the case where I, dissenting from the Committee's views, find certain violations of the Covenant over and above those determined by the Committee. The other issue relates to the obligation of the State party to provide an effective remedy to the author. Here, my opinion is to be understood more as a clarification than a dissent.

Violation of articles 9 and 14

According to article 5, paragraph 1, of the Optional Protocol the Committee shall consider a communication in the light of all written information made available to it by the individual and by the State party concerned. As in many other Jamaican cases involving the death penalty, counsel to the author has provided the Committee with lengthy submissions and extensive documentation, including transcripts of the domestic court proceedings. The State party, in turn, has submitted a letter of three and a half pages, addressing simultaneously both the admissibility and the merits of the communication, "in the hope of expediting its examination". The State party submission does not address all the complaints presented by the author, and on certain points it makes far-reaching inferences on the basis of the material submitted on behalf of the author without offering any additional proof. When, for instance, counsel to the author had used, erroneously as it appears, the term "extradition" of the author's deportation from Canada, the State party asserts that it would be "inconceivable" that the author, when extradited, had not been informed of the charges against him in compliance with article 9 of the Covenant.

The conduct of the State party puts the Committee in a position where it must choose between either finding violations of the Covenant on the basis of author's allegations presented in counsel's submissions and not properly answered by the State party or examining the extensive documentation submitted on behalf of the author in order to make an autonomous investigation of the merits of each allegation. Both of these approaches are untenable and bear the risk of errors which, in death penalty cases, may be lethal in the literal meaning of the term. The only alternative to these two approaches would be to request additional information and clarifications from the parties, an option the Committee is unwilling to take both because of its extremely scarce resources and because of the fully justified aim of expeditious handling of death penalty cases.

My findings of the facts of the case differ in two points from those of the Committee, and lead to two additional findings on violations of the Covenant in the author's case.

(i) According to the author he was interviewed in Canada in respect of several crimes that had occurred in Jamaica. Immediately upon his deportation to Jamaica, erroneously referred to as "extradition" by both counsel and the State party, the author was taken into custody. Only some three weeks later, on 11 May 1994, he was informed of the specific charges against him. The State party has failed to answer these allegations in a proper way, as it rests on an incorrect inference made from the notion of extradition. On the basis of all written information made available to the Committee by the individual and by the State party I find that there has been a violation of article 9, paragraph 2, of the Covenant.

(ii) My approach to alleged violations of article 14 (fair trial) rests partly on the above finding. If the author was originally interviewed in respect of several crimes and if he was, before being charged of the murder of Mr. Errol Cann, kept in custody for several weeks without effective access to a lawyer, there must be serious doubt as to whether the trial that followed could ever meet the requirements of a fair trial, in particular in a case involving the death penalty. The narrative presented in paragraphs 2.4 to 2.6 of the Committee's views of the murder of Mr. Cann is, unfortunately, quite telling of the nature of the trial. In paragraph 2.5 the Committee refers to the testimony of Ms. Dorothy Shim who was driving the car in which Mr. Cann was shot. According to the Committee, the witness had to halt the car "because she noticed a small boy pushing a cart out of the car's path". In paragraph 2.6 the Committee refers to a testimony by a David Morris, who at the time of the crime had just turned 13 years old and is referred to as "a small boy" on several occasions in the documentation submitted to the Committee by author's counsel. According to the Committee's narrative, Morris would have testified that he was kidnaped by the author and some other men on the previous evening and then, at the scene of the crime, been "forced to push a hand cart into the middle of the road".

This narrative appears coherent but represents only a reconstruction of what might have happened at the scene of the crime. As the author was identified as one of the assailants by David Morris only, the truthfulness of the author's participation in the crime does not depend on whether the description of the events is otherwise coherent. The problem, however, is that had the narrative presented in paragraph 2.6 of the Committee's views been the story by David Morris, this would have associated himself to the crime. Besides putting David Morris himself at risk of correctional measures this would have cast doubts on the reliability of David Morris identifying not just two or three but *six* men, including the author, as the assailants. It is to be noted that four of the six were not found guilty, one as the prosecution dropped charges, two by the jury and one on appeal. The author was the only one of the six to receive capital punishment, although no one had stated that he would have been the person who shot the lethal shot at Mr. Cann. Furthermore, the five other defendants had been identified by David Morris in identification parades, some of which were later on found unreliable. In contrast, no identification parade was held in the author's case as David Morris according to his own testimony knew the author personally (see paras. 3.5 and 3.6 of the views). David Morris had, according to the author and this was not contested by the State party, identified the author as one of the assailants on 11 May 1994, eleven months after the crime, with the assistance of the police and on the very day when the author was finally informed of the charges against him. The author has denied knowing David Morris. The statements given by David Morris to the police shortly after the murder, probably including information as regards the identity of the assailants *if* at that time known by Morris, were never presented to the domestic courts, or by the State party to the Committee.

The testimony of David Morris, as it appears from the trial transcript, was that after being kidnaped by a group of men on 10 June 1993 and being detained by them over the night, he was brought by the men to the crime scene on the following day. There he was released and could freely, without being involved in the crime, witness Mr. Cann being murdered and then leave the scene. It is obvious to me that the trial testimony by David Morris is unreliable and that the Committee should not have altered the narrative of the events in order to add coherence to the case of the prosecution. What becomes crucial in relation to the possible findings of the Committee is whether this had any bearing on the fairness of the trial. The author was found guilty of capital murder by a jury. The trial transcript shows that the trial judge was very clear and detailed in pointing out the inconsistencies in the evidence on which the prosecution's case rested, in particular in relation to the story of David Morris, who at the time of the trial was under 15 years of age and was the sole person that had identified any one of the six accused persons, and all six of them.

The Committee has dealt with the relevance of a verdict by a jury for the Committee's own work in the case of *Byron Young v. Jamaica* (Communication No. 615/1995), in which the Committee took the position that very limited possibilities to contest a verdict by jury in domestic appeal proceedings does not constitute a violation of article 14 provided, *inter alia* that the trial itself was not unfair.

In the present case the trial judge was both skilled and conscientious in pointing out the inconsistencies in the prosecution's case. As the jury, nevertheless, returned a verdict of guilty in the case of the author, this does as such prove neither that the trial was fair nor that it was not fair. My finding that the trial could not be, and was not, fair is based on the following facts: (a) the author was detained for more than three weeks before being informed of the crime he was suspected of, (b) he had very limited access to a lawyer before the actual trial, which had an effect on his defence through a legal aid counsel, (c) the trial took place a year after the author was arrested and almost two years after the crime, and (d) the identification of the author as one of the assailants was made solely by David Morris who at the time of the crime had been barely 13 and whose statements given to the police, when detained soon after the incident, were never presented to the court. The State party is directly responsible for all these factors and they have not been properly addressed by the State party in the proceedings before the Committee. Taken together, these factors have the effect that the author did not have a fair trial, as guaranteed in article 14, paragraph 1, and further specified in paragraphs 2 and 3 of the said article and, in relation to cases involving the death penalty, in article 6, paragraph 2.

My finding does not contest the Committee's position that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case, and that it is for the domestic appellate courts to review the judge's instructions to the jury and the conduct of the trial (see, para. 6.3 of the views). My point is that, in the circumstances of the case, the author could not receive a fair trial in April 1995, after he had been denied the prerequisites of a fair trial through the preceeding events identified above as (a) to (d).

The question of an effective remedy

The practice of the Committee in relation to the remedy has undergone a process of evolution during the twenty years of the Committee's work under the Optional Protocol. It is a legal obligation of a State party under article 2, paragraph 3, of the Covenant to ensure that any person whose rights protected by the Covenant have been violated "shall have an effective remedy". In addition to this general provision, article 9, paragraph 5, establishes a right to compensation for unlawful arrest or detention either under the

Covenant or domestic law. Both of these obligations stem directly from the Covenant and not from the Committee's mandate to issue, when performing its functions under the Optional Protocol, interpretations or recommendations on what measures would in each case constitute an effective remedy. In its very first views the Committee did not specify the nature of the remedy even though the case clearly fell under article 9, paragraph 5 (see the views in *Moriana Hernández Valentini de Bazzano et al. v. Uruguay*, Communication No. 5/1977). However, already in its second case the Committee specified that compensation was the appropriate form of remedy in a case where a violation of article 9 was established (see, *Edgardo Dante Santullo Valcada v. Uruguay*, Communication No. 9/1977). In later years the Committee has recommended compensation as the remedy or as a part of the remedy in many cases in which a violation of only other articles than article 9 have been found. The first such recommendations of compensation were issued in the Committee's views adopted in its 15th session (1982) in the cases of *Pedro Pablo Camargo v. Colombia* (Communication No. 45/1979) and *Mirta Cubas Simones v. Uruguay* (Communication No. 70/1980), after finding a violation of article 6, and articles 10 and 14, respectively.

It is to be expected that the evolution towards more specific pronouncements on the remedy will continue. It should, for instance, be welcomed by the Committee that authors or counsel specify, when sending submissions to the Committee, the amount of compensation they consider appropriate for the violation suffered, and that State parties present their observations on such claims when answering to communications. This would enable the Committee to take the next logical step in addressing the issue of remedies, namely, to specify the amount and currency of compensation in those cases where compensation is seen by the Committee to be an appropriate remedy. This would strengthen both the nature of the Optional Protocol procedure as an international recourse to justice and the Committee's role as the internationally authoritative interpreter of the Covenant.

In death penalty cases the Committee has after finding a violation of the Covenant often, but not always, recommended either commutation or release as an effective remedy. Both of these remedies make it clear that when a person has been sentenced to death in violation of the Covenant or treated contrary to the provisions of the Covenant while awaiting execution, the remedy should include an irreversible decision not to implement the death penalty. The Committee has been particularly clear and consistent on this point when the requirements of a fair trial under article 14 have been found to be violated. In several cases the Committee has explicitly stated that the imposition of the death penalty after a procedure that does not meet the requirements of article 14 entails a violation of the right to life, i.e. article 6 of the Covenant.

In cases involving a violation of articles 7 and/or 10 of the Covenant in relation to persons on death row, the Committee has not been consistent in formulating its specific recommendations as to the remedy. This cannot, of course, alter the main rule that the victim is entitled to an *effective* remedy under article 2, paragraph 3, of the Covenant. In the final paragraph of the views in its most important case related to the death penalty, the case of *Earl Pratt and Ivan Morgan v. Jamaica* (Communication Nos. 210/1986 and 225/1987) the Committee gave a clear and convincing answer to the question what constitutes "effective remedy" to a person awaiting execution:

"Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party *of any of its obligations under the Covenant*. The Committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 *are entitled to a remedy; the necessary prerequisite* in the particular circumstances is the commutation of the sentence." (italics added)

In the light of what has been said above the pronouncement in paragraph 10 of the Committee's views in the present case is not as clear as I would have hoped. In accordance with article 2, paragraph 3, the Committee states that the remedy to be provided to the author must be an effective one. After that reaffirmation of the legal obligation the State party has directly under the Covenant the Committee, however, indicates that in the present case an "effective remedy" would entail compensation. On the basis of the violations determined by the Committee, it should in my opinion have been made clear that an effective remedy must include both commutation and compensation. As I have found a violation of articles 9 and 14 in addition to those determined by the Committee, I would have seen it appropriate to state that the author is entitled, as an immediate and irreversible measure, to the commutation of his death sentence, and thereafter to either a new trial or release. In any case it should be made more clear that an "effective remedy" in a case involving the death penalty and in which a violation of the Covenant is found must include, first and foremost, absolute protection of the victim against execution. To a person on death row it is a precondition for any other remedy being "effective" that he or she can preserve his or her life.

(Signed) M. SCHEININ

(Original: English)

Z. Communication No. 750/1997, S. Daley v. Jamaica*
(adopted on 31 July 1998, sixty-third session)

Submitted by:	Silbert Daley (represented by Allen & Overy, a law firm in London)
Victim:	The author
State party:	Jamaica
Date of communication:	17 April 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 1998,

Having concluded its consideration of communication No.750/1997 submitted to the Human Rights Committee by Silbert Daley, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Silbert Daley, a Jamaican citizen, born on 23 January 1957, currently awaiting execution at St. Catherine's Prison, Kingston, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Allen & Overy, a law firm in London, England.

Facts as presented

2.1 The author was convicted of capital murder on 10 June 1992. His appeal against his conviction succeeded and on 30 January 1995 the Court of Appeal ordered a retrial. At the end of the retrial, on 26 October 1995, the author was again convicted of capital murder. His appeal was dismissed on 22 July 1996. His application for special leave to appeal was dismissed by the Judicial Committee of the Privy Council on 9 April 1997. Counsel notes that the author has not pursued a constitutional motion, and argues that in the circumstances of the author's case, this would not constitute an available remedy to the author, due to the high costs involved and the absence of legal aid.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, and Mr. Maxwell Yalden.

2.2 At trial, the case for the prosecution was that the author, on 24 November 1988 at about 6.45 a.m., murdered one Neville Burnett, a security guard, in furtherance of a robbery. The case was solely based on the evidence of a witness, Dennis Dias, who identified the author as the perpetrator of the murder. According to his evidence, he was sitting in a parked van early in the morning of 24 November 1988, when he saw a man wandering back and forth along another road. He recognized him as 'Junior White' or 'Sleepy Boy', whom he had known since basic school. He then saw a car pulling up outside the Bank across the street. The driver of the car, Neville Burnett, removed a bag from the car and approached the night deposit box of the Bank. Junior White then walked up behind him and shot him in the head. The attacker walked away with the bag and got into a white motorcar which had two other occupants. The witness followed the car to 85 Red Hills Road, where the attacker was dropped off. According to the witness, Junior White was known to live at this address. At trial, Mr. Dias identified the author as the same person known to him as Junior White or Sleepy Boy.

2.3 Based on information given by Mr. Dias to the police, an arrest warrant was drawn up for the arrest of Junior White. He was however not found at the address given by Mr. Dias.

2.4 On 12 September 1991, nearly three years later, Mr. Dias was collected by the police and driven to a gas station where he identified the author as the person who killed Neville Burnett. The author was later arrested.

2.5 At trial, the author gave an unsworn statement from the dock in which he denied any knowledge of the killing. The defence case was based on mistaken identity.

The complaint

3.1 Counsel claims that the author was only informed of the charges against him a month and a half after his arrest on 12 September 1991. This is said to constitute a violation of articles 9(2) and 14(3)(a) of the Covenant.

3.2 Counsel claims that after his arrest, the author was beaten by four policemen at Constant Police Station. After his transfer to Half Way Tree Lock Up, the author was allegedly kept in a cell with up to 14 other men and allowed out for only short periods of time. There was no bedding in the cell and he had to sleep on the floor. There were no proper toilet facilities. After his transfer to the General Penitentiary, the author claims that he was kept with three inmates in an insect-infested cell. He was not given slop buckets.

3.3 Counsel claims that the author's representative at the retrial was flagrantly incompetent, thereby depriving the author of a fair trial in violation of article 14(3) of the Covenant. It is submitted that the trial judge had to intervene on several occasions and that counsel made major errors: in particular, she failed to cross-examine properly the main prosecution witness, told the jury that the author's alleged accomplice had been sentenced to death in another trial, misquoted evidence, put false suggestions, mis-stated the basic law. In the summing-up, the judge pointed out several errors made by counsel and told the jury not to visit her mistakes upon the accused. It is further submitted that counsel failed to keep an appointment with a character witness who was to testify for the author, and then closed the case without asking for an adjournment in order to obtain the presence of the witness.

3.4 Counsel claims that the delay of 2 years and 7 months between the author's first conviction (10 June 1992) and the hearing of his appeal (30 January 1995), as well as the overall delay of 4 years and 10 months between the date of his original conviction and the hearing of the Privy Council appeal on 9 April 1997, is in violation of articles 9(3), 14(3)(c) and (5) of the Covenant.

3.5 With regard to the appeal, it is submitted that the author only met with his appeal lawyer on one occasion for about ten to fifteen minutes. Counsel claims that this was insufficient to ensure adequate preparation of the appeal and that this amounted to a violation of article 14(3)(b) of the Covenant. It is moreover submitted that at the hearing of the appeal in July 1996, the author's legal representative admitted that he could not support the appeal, thereby effectively abandoning the appeal and leaving the author without representation, in violation of article 14(3)(d) of the Covenant.

3.6 Counsel claims that the author is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant, because of the length of time spent on death row. In this context, reference is made to the decisions of the Judicial Committee of the Privy Council in *Earl Pratt and Ivan Morgan v. the Attorney General of Jamaica* and in *Guerra v. Baptiste and Others*. In this connection, counsel points out that the author was imprisoned on death row from 10 June 1992 (the date of his first conviction) to 30 January 1995 (when a retrial was ordered). He was released on bail on 10 August 1995, but again imprisoned on death row since 26 October 1995, the date of his second conviction. It is submitted that the accumulated time spent on death row, in being taken off death row and sent back to it, results in an agony of suspense and amounts to a violation of articles 7 and 10 (1) of the Covenant.

3.7 After his conviction, the author was kept in detention in St. Catherine's District Prison. Counsel refers to several reports describing the conditions in the prison and submits that the author is kept in solitary confinement in a 9 x 6 foot cell for up to 23 hours a day. No mattress is provided and the author sleeps on a sponge. There is no integral sanitation and he has to use a slops bucket for his toilet. There is inadequate ventilation and no artificial lighting. It is submitted that the conditions of detention to which the author has been and continues to be subjected are in breach of the United Nations Standard Minimum Rules for the Treatment of Prisoners and constitute a violation of articles 7 and 10(1) of the Covenant.

3.8 It is further submitted that the author has been subjected to numerous assaults from other prisoners which, on one occasion, resulted in the author spending three weeks in hospital. According to the author, other prisoners are plotting to kill him. His requests to be moved to another prison block have only been temporarily allowed. Counsel submits that he has written to the Superintendent and to the Commissioner of Corrections to no effect.

3.9 Finally, counsel argues that the imposition of the death penalty after a trial in which the provisions of the Covenant were not respected constitutes a violation of article 6 of the Covenant.

State party's observations and counsel's comments thereon

4.1 By note of 25 June 1997, the State party denies that any breaches of the Covenant occurred in the author's case.

4.2 With regard to the author's claim that he was detained for one-and-a-half month before being formally charged, the State party submits that in any event the author was made aware of the charges against him at the time of his arrest.

4.3 With regard to the delay of two and a half years between the first conviction and the hearing of the author's appeal, the State party acknowledges that such a delay is longer than is desirable, but submits that it did not lead to any prejudice to the author. It further notes that, once the appeal was heard, the subsequent proceedings were initiated without delay.

4.4 Concerning the behaviour of counsel for the author at the (second) appeal, the State party notes that the author was represented by a highly respected and competent Queen's Counsel. According to the State party, the manner in which counsel conducted the appeal is not the responsibility of the State unless agents of the State prevented him from doing his duty. Since this was not the case, the State party denies that it is responsible for a violation of the Covenant in this respect.

4.5 With regard to the competence of counsel during the trial, the State party submits that a thorough examination of the transcript will show that there are no reasons to criticise counsel's conduct and that no prejudice to the author occurred.

5.1 In his comments, dated 7 November 1997, counsel for the author notes that the State party has not made any observation in relation to the claims under articles 7 and 10, paragraph 1, of the Covenant, nor has it carried out an investigation into the assaults committed on the applicant by other inmates.

5.2 In support of his claim that a delay of one and a half month in formally charging the author constitutes a violation of article 9 and 14(3)(a), counsel refers to the Committee's Views in communication Nos. 707/1996[1] and 248/1987[2]. Counsel adds that during that period of time, the author was also denied access to a lawyer or contact with his family. According to counsel, in not being allowed access to a lawyer for six weeks, the author could not take proceedings on his own initiative to have the lawfulness of his detention determined.

5.3 With regard to the delay of two years and seven months between his conviction and the hearing of his appeal, counsel argues that the fact that further proceedings took place with dispatch is irrelevant, and reiterates his claim that this particular delay as well as the overall delay of 4 years and ten months between the date of his original conviction and the hearing by the Privy Council constitutes a breach of articles 9(3), 14(3)(c) and 14(5) of the Covenant.

5.4 With respect to the conduct of the defence at the trial, counsel reiterates his claim that the transcript clearly shows trial counsel's incompetence and that this prevented a meaningful defence being put forward to the jury.

5.5 With regard to the abandonment of the appeal by counsel, reference is made to the Committee's jurisprudence.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human

Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party has forwarded comments on the merits of the communication and that it has not challenged the admissibility of the communication. The Committee therefore declares the communication admissible and proceeds, without further delay, to an examination of the substance of the claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 The author has alleged that he was not informed of the charges against him until six weeks after his arrest. The Committee notes that the State party has replied that even if he was not formally charged, he was made aware of the charges against him. At his second trial (October 1995) the author himself testified that the two policemen who arrested him told him that "they were taking me for the death of Neville Burnett on the 24th of November 1988". However, the State party's reply implies an acknowledgement that the author was not brought before a judge or judicial officer until after six weeks of detention. The Committee refers to its jurisprudence[3] under the Optional Protocol, according to which delays in bringing an arrested person before a judge should not exceed a few days[4]. A delay of six weeks cannot be deemed compatible with the requirements of article 9, paragraph 3.

7.2 The Committee notes that the State party has failed to address the author's claims that he was beaten up by policemen after his arrest and that he was kept in deplorable conditions of detention before his trial. In the absence of a reply from the State party, due weight must be given to the author's detailed allegations. The Committee finds that the beatings and the conditions of pre-trial detention as described by the author constitute a violation of articles 7 and 10, paragraph 1, of the Covenant.

7.3 The author has claimed that the bad quality of the defence put forward by his counsel at trial resulted in depriving him of a fair trial. In this context, the Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the Committee does not show that this was so in the instant case, and consequently, there is no basis for a finding of a violation of article 14, paragraph 3, in this respect.

7.4 Counsel has claimed that the delay between the author's first conviction and the hearing of his appeal, a period of 2 years and 7 months, constitutes a violation of articles 9, paragraph 3, and 14, paragraph 3(c). The State party has acknowledged that such a delay is undesirable, but has not offered any explanation justifying the delay. In the circumstances, the Committee finds that the length of the delay is in violation of article 14(3) (c), in conjunction with article 14 (5), of the Covenant.

7.5 With regard to counsel's claim that the author was not effectively represented on appeal, the Committee notes that the author's legal representative on appeal conceded that there was no merit in the appeal. The Committee recalls its jurisprudence[5] that under article 14, paragraph 3(d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Daley should have been informed that his legal aid counsel was not going to argue any grounds in support of his appeal, so that he could have considered any remaining options open to him. The Committee concludes that there has been a violation of article 14, paragraph 3(d), in respect to the author's appeal. In the light of the above, there is no need for the Committee to address the author's claim of a violation of article 14 (3) (b) in relation to the preparation of the appeal.

7.6 The author has claimed that his continued detention on death row in itself, as well the conditions of this detention, constitute a violation of articles 7 and 10, paragraph 1, of the Covenant. The Committee reaffirms its constant jurisprudence[6] that detention on death row for a specific period - in this case two years and seven months after his first conviction, and two years and eight months after his second conviction - does not violate the Covenant in the absence of further compelling circumstances. The conditions of detention may, however, constitute a violation of articles 7 and 10 of the Covenant. Mr. Daley alleges that he is detained in particularly bad and insalubrious conditions on death row; this claim is supported by reports which are annexed to counsel's submission. There is lack of sanitation, light, ventilation and bedding. Counsel's submission takes up the main elements of these reports and shows that the prison conditions affect Silbert Daley himself, as a prisoner on death row. Furthermore, the author has claimed that he has been assaulted regularly by other inmates, leading to his hospitalization, and that the State party has taken no measures to protect him. The author's claims have not been refuted by the State party, which remains silent on the issue. The Committee considers that the conditions of detention described by counsel and which affect Mr. Daley directly are such as to violate his right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1.

7.7 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant if no further appeal against sentence is possible. In Mr. Daley's case, the final sentence was passed without the guarantee of a proper defence at appeal, in violation of article 14, paragraph 3(d), of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraph 3, 10, paragraph 1, 14, paragraph 3 (c) & (d) *juncto* paragraph 5, and consequently of article 6 of the Covenant.

9. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide Silbert Daley with an effective remedy, including

commutation, compensation and early release. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] Patrick Taylor v. Jamaica, Views adopted on 18 July 1997.

[2] Glenford Campbell v. Jamaica, Views adopted on 30 March 1992.

[3] See, *inter alia*, the Committee's Views in cases Nos. 702/1996 (Clifford McLawrence v. Jamaica), adopted on 18 July 1997, paragraph 5.6, and 704/1996 (Steve Shaw v. Jamaica) adopted on 2 April 1998, para. 7.3.

[4] See also General Comment 8 {16} of 27 July 1982, para.2.

[5] See, *inter alia*, the Committee's Views in cases Nos. 734/1997 (Anthony McLeod v. Jamaica), adopted on 31 March 1998, paragraph 6.3; 537/1993 (Paul Anthony Nelly v. Jamaica), adopted on 17 July 1996, para. 9.5.

[6] See *inter alia*, the Committee's Views in cases Nos. 588/1994 (Erroll Johnson v. Jamaica), adopted 22 March 1996, paras. 8.1 to 8.6; 554/1993 (Robinson LaVende v. Trinidad and Tobago), adopted 29 October 1997, paras. 5.2 to 5.7; and 555/1993 (Ramcharan Bickaroo v. Trinidad and Tobago), adopted 29 October 1997, paras. 5.2 to 5.7.

AA. Communication No. 813/1998, D. Chadee v. Trinidad and Tobago* (adopted on 29 July 1998, sixty-third session)

Submitted by:	Dole Chadee et al (represented by Mr. David Smythe, of Kingsley Napley, a law firm in London)
Victim:	The authors
State party:	Trinidad and Tobago
Date of communication:	1 April 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1998,

Having concluded its consideration of communication No.813/1998 submitted to the Human Rights Committee by Dole Chadee et al., under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Nankissoon Boodram (Dole Chadee), Joel Ramsingh, Joey Ramiah, Ramkalawan Singh, Russell Sankeralli, Bhagwandeen Singh, Clive Thomas, Robin Gopaul and Stephen Eversley, all Trinidadian nationals at present detained on Death Row in the State Prison of Trinidad. They initially claim to be a victim of violations by Trinidad & Tobago of article 14 of the Covenant. They are represented by David Smythe of Kingsley Napley Solicitors in London, England.

The facts as submitted

2.1 On 10 January 1994, four members of the Baboolal family in Williamsville were murdered. Between 13 and 15 May 1994, the authors were arrested on suspicion of murder. On 21 July 1994, the preliminary enquiry commenced, which concluded on 30 September 1994 with the authors plus one other accused, Levi Morris, being committed for trial. On 1 November 1994, Dole Chadee filed a constitutional motion (arising out of the pre-trial publicity) which was dismissed on 15 November 1994. Chadee's appeal was dismissed by the Court of Appeal on 20 January 1995. On 10 April 1995, Chadee was granted leave to appeal to the Privy Council, which dismissed the appeal in respect of the constitutional motion on 19 February 1996.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Mrs. C. Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of individual opinions by Committee members Eckart Klein, David Kretzmer and Martin Scheinin is attached.

2.2 On 10 June 1996, the trial began at Chaguaramas Assize Court. The trial was held in a converted building, which had been used only once before as a court house, and during the trial there was a heavy security presence. The authors applied for a permanent stay on the ground that their trial would be an abuse of the process of the Court, because of the extent of negative pre-trial publicity. The application was dismissed. An application to examine all potential jurors on oath before being sworn was allowed, pursuant to an amendment to the Jury Act enacted about a month before. The jury selection started on 17 June and was completed on 12 July 1996, after the judge had ordered the praying of a tales[1] on 28 June 1996. On 15 July 1996, a further application to stay the proceedings permanently on the ground that any trial would be an abuse of process was dismissed.

2.3 The authors' co-accused, Levi Morris, was arraigned on 10 June 1996, pleaded guilty to four charges of murder and was sentenced to death on each charge. Immediately thereafter a conditional pardon was produced and read and the four sentences of death passed on him were commuted to sentences of life imprisonment. The pardon was subject to the condition that he undertook to give evidence for the prosecution in accordance with a statement given by him on 4 June 1996 and that that statement was true.

2.4 On 3 September 1996, the authors were convicted for murder of four members of the Baboolal family. They were all sentenced to death. On 16 May 1997, the Court of Appeal dismissed their appeals. On 1 April 1998, the Judicial Committee of the Privy Council in London refused to give leave to appeal. With this, all domestic remedies are said to be exhausted.

2.5 At trial, the case for the prosecution was that at about 2.00 am on 10 January 1994, a masked armed gang burst into the home of the Baboolal family in Williamsville and murdered four members of that family (the father Deo, the mother Rookmin, the son Hamilton and the daughter Monica). The prosecution led evidence that Dole Chadee organised the raid and that the authors except for Chadee, went in four vehicles from Chadee's farm to carry out the raid. They were armed with firearms and a sledgehammer. Ramkalawan Singh and Sankeralli took two of the vehicles to a place about a mile from the Baboolal's home, whilst the others carried out the raid. Two children (Osmond and Hamatee) who were in the house escaped. The attack team then drove to the meeting point, where the number plates of the cars were removed. The prosecution's case was largely based on evidence given by the accomplice Levi Morris and on a statement deposed by the accomplice Clint Huggins[2], who died before the beginning of the trial. The deposition made by Huggins was admitted into evidence by the judge after he conducted a voir-dire on the matter. Fingerprint evidence was also led.

2.6 The accused denied any involvement in the murders and claimed that the prosecution was the result of a conspiracy between the police, alleged accomplices and other witnesses to frame them because of their belief that Chadee was an international drug dealer leading a gang of murderers. The fingerprint evidence, purportedly identifying a partial thumbprint of Ramsingh on the broken front number plate of one of the cars, was challenged by them.

The complaint

3.1 The authors claim that the adverse pre-trial publicity prejudiced the trial against them. Widespread and continuous publicity suggested that Chadee was a notorious drug baron, wanted for international drug trade. The publicity also suggested that witnesses and others who participated in the legal process against Chadee were at risk of being killed. It is submitted that the prejudice created by the publicity was of such poisonous nature and persistence that no Court could be satisfied that any trial of the accused would be fair. It is further submitted that the mechanisms available to the trial judge, such as the examination of potential jurors and emphatic judicial warnings, were not capable of defusing that prejudice with the necessary degree of certainty required. It is also claimed that the Court of Appeal proceedings were tainted, because of the continuing publicity against the authors. It is submitted that the Attorney-General and the Director of Public Prosecutions should have taken measures to prevent the prejudicial publicity, as they would have been aware of its impact on the fairness of the trial.

3.2 The authors claim that the selection of the jury was flawed. It is submitted that each juror was examined to ascertain to what extent the adverse publicity had influenced them and that it then became apparent that an impartial jury could not be empanelled. It appears from the file that the defendants successfully challenged 169 potential jurors for cause, and used 36 peremptory challenges. The process of jury selection occupied 14 days. According to counsel, the evidence during the examination of the prospective jurors, as well as the number of challenges, shows that the prejudice against the authors, and in particular against Dole Chadee, was extensive and deep rooted, and that no section of the community was untouched by the prejudice. In this context, the authors also claim that the judge erred in law when he denied the accused the right to challenge some of the prospective jurors for cause, thereby forcing them to consume their limited peremptory challenges, as a consequence of which the jury contained persons who were biased or potentially biased. It is stated that the procedure adopted for the selection of new jurors after the existing panel had been exhausted was flawed and wrong in law, thereby rendering the trial a nullity. It is submitted that rather than ordering a tales, the judge should have discharged the jury members selected and put the case over to the next Assizes court to have a new, larger panel summoned.

3.3 The authors claim that the conduct of the trial was unfair and prejudiced against them. In this context, it is submitted that the judge allowed the evidence of the alleged accomplice Huggins to be read out to the jury, because he had died prior to the trial. Counsel claims that this witness had never been cross-examined regarding the immunities that he had been offered as these had not been disclosed to the defence at the time his evidence had been taken at the preliminary hearing.

3.4 It is also stated that the judge permitted hearsay evidence to be received before the jury, and that he failed to instruct the jury as to how to approach such evidence. The authors further claim that the judge failed to direct the jury that they should disregard the evidence of a scientific officer called by the prosecution at trial whose evidence concerning the blood stain found in one of the cars was not probative but prejudicial.

3.5 Counsel also claims that there were serious misdirections in the summing-up. In particular, the judge allegedly failed to remind the jury adequately of the differences between the evidence given by the prosecution's expert concerning the thumbprint on the car's plate, and the defence's expert in the same matter. This is said to be particularly significant, as the thumbprint was the only evidence, other than that given by the accomplices, linking the accused Joel Ramsingh to the murders. Moreover, if the evidence given on behalf of the defence were to be accepted by the jury, it would have discredited the evidence by the accomplices, thereby also discrediting the prosecution's case. The judge allegedly also failed to direct the jury properly with regard to the evidence given by the accomplices, and failed to draw to the jury's attention discrepancies in the evidence.

3.6 It is also stated that during his final address to the jury, counsel for the prosecution made a number of inflammatory remarks calculated to rekindle the prejudice caused by the publicity and to engender hatred against Dole Chadee. It is submitted that the judge failed to stop counsel for the prosecution from making such remarks and moreover, that he failed to give any appropriate remedial direction.

State party's observations

4.1 In its observations, the State party contends that the matters complained of do not amount to a violation of article 14 or any other article of the Covenant. The State party recalls that the authors' complaints have already been fully aired both before the Court of Appeal and the Judicial Committee of the Privy Council. According to the State party, the evidence against the authors was factually uncontradicted, and therefore the jury's verdict cannot be said to have been perverse.

4.2 With regard to the allegations made by the authors concerning the judge's directions to the jury, the State party refers to the Committee's jurisprudence that it is generally not for the Committee, but for the appellate courts of States parties, to review specific directions by the judge to the jury. The State party therefore argues that this part of the communication is inadmissible under article 3 of the Optional Protocol.

4.3 Also, in respect of the judge's discretion in relation to the admission of evidence, the State party submits that it is generally for the appellate courts to review this discretion, and that in the absence of manifest arbitrariness or denial of justice, this part of the communication is to be declared inadmissible as being incompatible with the provisions of the Covenant.

4.4 With regard to the complaint that the trial judge should have stayed the proceedings on the basis of the pre-trial publicity, the State party notes that article 14 of the Covenant provides that in the determination of a criminal charge against him, everyone shall be entitled to a fair trial by a competent, independent and impartial tribunal, not that he should be entitled to avoid such a determination altogether. The State party explains that under its legislation, a stay of trial will not be granted unless it is established that it would be impossible to empanel an impartial jury. The State party challenges as contrary to law counsel's argument that because it was difficult to ensure a fair trial, the trial should have been stayed. According to the State party, where there has been substantial pre-trial publicity, as there was in this case, it is the judge's duty to take such steps as he believes necessary to ensure that the trial is fair. The State party submits that the judge did exactly that in this case. As a result, 12 jurors were sworn in who were fair minded, unbiased and fully capable of providing a fair trial to the authors. In this connection, the State party contends that staying the trial would have put the authors above the law. In respect to the authors' argument that the DPP should have taken steps to halt the adverse publicity, the State party submits that this complaint is irrelevant to the question whether or not the authors had a fair trial.

4.5 With regard to the authors' complaint that the selection of the jury was flawed, the State party provides information about the examination of the twelve jurors selected, and notes that it is impossible to say that the jurors in this case were biased. It notes that the authors base their claim on the fact that because of the pre-trial publicity any juror might have been suffering from unconscious prejudice. The State party contends that in the absence of bias on the part of the jurors, no such complaint can lead to the view that the trial was unfair or that the tribunal was not impartial. The State party further notes that the authors' complaint about how the tales was conducted is based on a legal technicality, and that their argument was rejected by the Court of Appeal. It states that this could not possibly have affected the fairness of the trial.

4.6 With regard to the complaint that Huggins' deposition should not have been admitted, the State party notes that the witness had made a sworn deposition at the Preliminary Enquiry before a Magistrate and had been extensively cross-examined by counsel for the defence, as certified by the Magistrate. In respect of the authors' argument that at the time of the Preliminary Enquiry they were not informed about the immunities from prosecution given to Huggins, the State party refers to the finding of the Court of Appeal and contends that this did not deprive the defence of the opportunity for full cross-examination. The State party further notes that a voir dire was held at the beginning of the trial which included hearing evidence sought by the defence, with a view to discrediting Huggins' deposition; after this the judge allowed the deposition to be read. In his decision, the judge took into consideration the State's undertaking to tender all witnesses required by the defence for the purposes of exploring Huggins' credibility before the jury, and the fact that they were indeed produced and gave evidence.

4.7 With regard to the authors' claim that the judge allowed hearsay evidence, the State party observes that hearsay evidence as such does not violate article 14 or any other article of the Covenant. The State party further notes that the evidence complained of was solicited by the defence in cross-examination by the witness Morris and went directly to his credibility. The State party argues that where a trial judge allows experienced defence counsel to ask perfectly proper questions of a prosecution witness in cross-examination, the answers obtained cannot lead to the trial becoming unfair. On the contrary, if the judge curtailed such cross-examination, that could in certain circumstances result in unfairness.

4.8 Concerning the expert evidence on blood stains found in the Mazda car, the State party notes that the defence never disputed that the car was used in the killings. The State party therefore submits that the evidence could not possibly have deprived the authors of a fair trial.

4.9 With regard to the prosecution's final speech, the State party argues that however inflammatory, it could not have deprived the authors of a fair hearing. The State party notes that everything said in the speech was justified on the basis of the prosecution's case. Moreover, the judge directed the jury to disregard certain suggestions made by the prosecution. Furthermore, the State party notes that the authors' defence was based on the theory of a conspiracy to frame Chadee because of his reputation as a drug lord. This is said to be more directly calculated to resurrect pre-trial publicity than anything in the Prosecution's final speech.

4.10 With regard to alleged misdirections in the summing-up, the State party contends that none of the complaints made by the authors is such as to render the trial unfair or to deprive the authors of their rights under the Covenant.

Counsel's comments

5.1 In his comments, counsel reiterates that the authors were denied a fair trial by allowing it to proceed in the light of the publicity and by permitting evidence to be called which was weak and untrustworthy. He emphasizes that the authors' complaint includes the decisions taken by the Court of Appeal and the Judicial Committee of the Privy Council. Counsel stresses that contrary to what the State party appears to think, the accused were not required to establish a positive defence, and the burden of proof should be on the State. Because of the alleged violations of article 14, rendering their conviction unsafe, the authors contend that they are entitled to an effective remedy, namely their immediate release.

5.2 In an additional communication, counsel newly claims violations of articles 6, 7 and 14 of the Covenant, and contends that the system of criminal law and justice with regard to those condemned to death upon conviction is discriminatory, arbitrary and is manipulated by the State for political ends. In this connection, counsel argues that following the Privy Council's decision in Pratt & Morgan, persons sentenced to death in Trinidad & Tobago have fallen into two categories: those whose appeals have been expedited so that their execution may not be aborted through the passing of time, and those whose appeals have been allowed to follow their normal course, so that their executions may be aborted through passing of time. It is submitted that the decision whether to expedite or not is taken by the Attorney General for reasons of political advantage.

5.3 It is alleged that, although to date no convicted person held on death row in Trinidad & Tobago has been executed, there is clear evidence that the authors have been "fast-tracked" so that their executions may not be prevented by the decision in Pratt & Morgan. In this connection, counsel notes that the authors' appeal hearing took place eight months after the conviction, whereas other appeals took much longer, from one year and seven months up to three year and ten months. Counsel refers to press clippings and argues that there is ample evidence that the Attorney General targeted the authors, and in particular Dole Chadee, so as to achieve his objective of resuming executions as quickly as possible. Counsel notes that, since the fast-tracking has no basis in law, it is an arbitrary process and discriminatory. According to counsel, this violates article 6 of the Covenant and moreover, article 7, since the deliberate selection and targeting of the authors so as to ensure their executions is cruel, inhuman and degrading treatment.

5.4 Counsel presents a second additional claim and argues that there has been a violation of article 7 of the Covenant, because of the inhuman conditions of detention to which the authors have been subjected since their arrest. He refers to questionnaires completed by Dole Chadee, Joey Ramiah, Joel Ramsingh, Bhagwandeen Singh, Russell Sankeralli and Robin Gopaul, which testify that the medical treatment in prison is unsatisfactory, that the sanitary facilities are inadequate, that the food is bad, that the water is contaminated, and that the cells are insufficiently ventilated and do not have natural lighting. It is further claimed that they are allowed out of their cell for not more than one hour every week to enjoy sunshine, but that they cannot exercise during those breaks because they are hand cuffed.

5.5 In addition, counsel claims on behalf of Russell Sankeralli, that there was insufficient evidence to convict him, as the witnesses did not give evidence that he was present when the alleged plot was revealed to the extent that he was aware of what was going to take place. It is claimed that he was not given a gun, and that he drove the get away car without knowing what the others were up to. At trial, a no case submission was rejected by the judge. Counsel admits that the point was not raised on appeal.

State party's further submission and counsel's comments

6.1 By note of 6 July 1998, the State party notes that counsel for the authors, in his comments on the State party's submission and 68 days after the initial communication was presented to the Committee, has made new claims, to which the State party must respond or otherwise they will be deemed admitted. According to the State party, the submission of new claims is a deliberate attempt to delay the Committee's consideration of the case, since the matters raised in the claims could have been raised in the initial communication. In this context, it recalls that, in order for any recommendation by the Human Rights Committee to be considered, the Government must receive the Committee's Views within a period of six months from the State party's response to the communication.

6.2 With regard to counsel's claim that the expeditious hearing of the authors' appeal violates articles 6, 7 and 14 of the Covenant, the State party refers to the time frames set up by the Privy Council's decision in Pratt & Morgan. Pursuant to this decision, the Court of Appeal is required to hear and determine appeals concerning death sentences within one year of conviction. The State party underlines that these are constitutional standards which have led to measures to streamline the procedures in capital cases with the objective of ensuring completion of the appellate process within the shortest possible time consistent with due process of law.

6.3 The State party submits that all cases are expedited and that no fast-tracking of individual cases has occurred. That some cases are completed in a shorter period of time than others is said to be due to the individual circumstances of each case. In this context, the State party explains that the main cause of delay is the availability of the written judgement. According to the State party, since 1996 the time taken to hear an appeal has varied between 3 and 12 months. The State party argues that any allegation that it has targeted the authors for expedition is without grounds, since the period of eight months between conviction and appeal fits within the general range now effected by the courts in order to comply with the decision of Pratt & Morgan.

6.4 With regard to the claim that there has been a violation of article 7 of the Covenant because of the conditions of detention, the State party denies that such a violation has taken place. According to the State party, the authors are held in the Royal Gaol in Port of Spain where conditions are sanitary. Proper food, clean water, medical attention and recreational facilities are provided and comply with international norms. The State party explains that each condemned prisoner has his own cell, which measures a standard six by nine feet, and ten feet in height. Each cell contains a single bed with a mattress and pillow and a small wooden bench. The arrangement of the cells allows the prisoners to converse with one another. The cells are warm and dry and there is no moisture or water accumulating in the cells. The cells are well ventilated by a ventilation vent (2.5 by 1.5 feet) built into the top of the back of the wall of each cell, which allows the outside air to come in. The corridors of the division have ceiling fans which circulate air into the cell areas. Each division has its own shower and toilet facilities, and once a day each prisoner is allowed to use these facilities. It is stated that all prisoners are provided with basic toiletries. A prisoner is allowed to empty his slop pail three times a day, in the morning, at midday and in the evening. The prisoners are allowed to fill their water jugs twice a day, in the morning and in the evening before lock down. If a prisoner runs out of water, he is allowed to refill the jug upon request.

6.5 The State party submits that each condemned prisoner is allowed to come out of his cell for sunlight and exercise at least one hour a day from Monday to Friday. On public holidays and weekends, the prison operates on minimal staff and as a result there are insufficient guards on duty to supervise the exercise of prisoners. In addition, prisoners will not be taken out if the weather is bad or if there is a security alert or a staff shortage. The State party explains that the Royal Gaol compound has two exercise yards. The main yard has 2289 square feet available for use, and the other 799. When a prisoner goes out to the exercise yard, each is accompanied by a security officer. Another officer is assigned to supervise all prisoners in the yard. The prisoners are hand-cuffed in front. Since incidents have occurred in the past with prisoners attacking guards or other prisoners, or trying to escape, the State party explains that death row prisoners are considered high risk prisoners and in the interest of safety their handcuffs are not removed during the exercise period. The State party explains that the prisoners are only hand-cuffed when they leave the cell division.

6.6 The State party submits that the prisoners are given a balanced diet, prepared by prison personnel trained at the Hotel School in Chaguaramas. Breakfast usually consists of milk, tea, coffee or cocoa with either porridge or bread and either butter, cheese, eggs, jam, corned beef, sardines, vegetables or peas. For lunch, either goat, pork, liver, chicken or fish, served with rice and peas or beans or vegetables. Dinner is similar to breakfast but in addition vegetables are sometimes served with bread. The prisoners are also given juice, sorrel or mauby as a drink. If prescribed by the prison doctor, prisoners will be given a special diet. The prison canteen sells food supplies. The prisoner's relatives can purchase up to a limit of $ 200 per week from the canteen to be given to the prisoner.

6.7 According to the State party, prison rules are posted around the prison. All condemned prisoners are entitled to three meals a day, family visits twice a week, four books at a time (new books can be brought by family every week), six cigarettes a day (if supplied by relatives), writing paper on request. Prisoners can write up to two letters a week to their families and unlimited letters to their lawyers and officials such as the Ombudsman. Newspapers are circulated every day and the radio is on in the division from 6 a.m. to 9 p.m. every day.

6.8 Two welfare officers are assigned to the prisoners. An Infirmary officer visits the divisions twice a day to treat minor complaints and to hand out any prescribed medication. The Prison Medical Officer visits the prison on a daily basis. Further, every two weeks the prisoners are visited in their cells by the prison doctor for a medical examination.

6.9 In respect of the additional claim on behalf of Mr. Sankeralli, the State party submits that the matters complained of do not amount to a violation of article 14 or any other article of the Covenant. The State party refers to the Committee's jurisprudence, and notes that the point raised now was not raised on appeal, although the author was represented by an eminent senior counsel.

7.1 In his comments, counsel for the author takes issue with the State party's reference to its instructions relating to applications, and to its statement that the Committee has to adopt its Views within six months in order for the Government to consider them. According to counsel these instructions are unlawful both at the domestic and at the international level, since they have not been approved by Parliament. Counsel argues that the instructions are "typical of the dictatorial and undemocratic modus operandi of the present regime". In this connection, counsel also refers to the State party withdrawal from the Optional Protocol as well as from the American Convention on Human Rights.

7.2 With regard to the authors' claim of discrimination in relation to the expedition of the appeal process, counsel contests the State party's claim that administrative, judicial and legislative reforms have been undertaken. He states that the only judicial activity in this respect is the hearing of constitutional motions in relation to the execution of the death sentence. Counsel claims that the statistics provided by the State party are "false and tendentious" and do not include those condemned persons whose appeals were delayed by administrative favour. According to counsel the justice system is inherently flawed in a manner which makes the application of the death penalty at worst discriminatory or otherwise capricious.

7.3 Counsel denies that the authors are seeking to manipulate the process by delay. He points out to difficulties in communicating with the authors in Trinidad.

7.4 In respect to the conditions in prison, counsel reaffirms the previous allegations and notes that the State party accepts that there is no sanitation in the cells save for a slop pail, and that there is no mention of any window or light in the cells. According to counsel, the ventilation hole providing fresh air must be inadequate to provide any level of relief in the prevailing climate. Counsel notes that the State party admits that prisoners are only allowed five hours a week of sunlight and exercise, and less if there are public holidays, inclement weather or security alert. Counsel concludes that this means that the authors are kept in their cell for a minimum of 48 hours at weekend. Counsel disagrees with the State party's description of the conditions of detention and maintains that the conditions are as described by the authors.

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With regard to the authors' claim concerning the conduct of the trial by the judge, the admittance of evidence, his treatment of the prosecution's final address and his instructions to the jury, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate Courts of States parties, to review the admissibility of evidence and the specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury or the conduct of the trial were manifestly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the trial judge's directions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

8.4 With regard to the additional claim raised by counsel in relation to the conviction of Russell Sankeralli, whom counsel claims was convicted on the basis of insufficient evidence, the Committee reiterates that the evaluation of facts and evidence is generally a matter for the courts of States parties, and not for the Committee, unless it can be ascertained that the evaluation was manifestly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

9. The Committee considers that the authors' remaining claims are admissible and proceeds to their examination on the merits.

10.1 The authors have claimed that they did not receive a fair trial because of (a) the pre-trial publicity, and (b) the process of jury selection. The Committee notes that the pre-trial publicity was extensive, and that for this reason the State party amended the law so as to allow examination of prospective jurors by the defence with the aim of determining whether the pre-trial publicity had affected them to the extent of being biased. The jury selection occupied 14 days and the defence successfully challenged 169 potential jurors for cause. In the end, twelve jurors were sworn. The Committee is of the opinion that, in the circumstances, the State party took proper measures to prevent the pre-trial publicity from rendering the trial unfair. That not all challenges for cause by the defence were allowed does not indicate that the judge did not discharge his duty properly. With regard to the process of jury selection through conduct of a tales, the Committee refers to its jurisprudence that it is for the courts of States parties, and not for the Committee, to review the application of domestic law, unless it is evident that the application was manifestly arbitrary or amounted to a denial of justice. This not being so in the instant case, the Committee finds that the facts before it do not reveal a breach of article 14 of the Covenant.

10.2 With regard to the authors' additional claim that their appeal has been expedited in order to ensure their execution, in violation of articles 6, 7, and 14 of the Covenant, the Committee has taken note of the statistics provided by both counsel and the State party in this respect. In this context, the Committee recalls that the State party is under an obligation, under article 14 (3)(c) and (5) of the Covenant, to ensure that appeals are heard without undue delay. The Committee should nevertheless examine whether the period of time between conviction and the hearing of the appeal is sufficient for the defence to prepare the appeal. After having examined the information before it, the Committee considers that it has not been shown that the period of time in the instant case was insufficient to prepare the appeal by defence counsel. The Committee concludes therefore that the facts before it do not show that articles 6, 7 and 14 have been violated in this respect.

10.3 Dole Chadee, Joey Ramiah, Joel Ramsingh, Bhagwandeen Singh, Russell Sankeralli and Robin Gopaul have provided information with regard to their conditions of detention. The State party has addressed the claims made by the authors, and has submitted that the authors' conditions of detention do not violate the standards set out in the Covenant. On the basis of the information before it, the Committee is not in a position to make a finding of a violation of article 10 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the provisions of the Covenant.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] An ancient common law system whereby, if so many potential jury-members are challenged that 12 cannot be empanelled, bystanders and members of the public in the vicinity are brought in to supplement numbers and complete the panel.

[2] The implication is that he, being in secure and secret accomodation for his own protection, became bored and went out, whereupon he was murdered.

APPENDIX

Individual opinion of E. Klein and D. Kretzmer (partly dissenting)

1. In the present case the authors made specific allegations regarding the quality of the water with which they are provided in jail. Thus, in a questionnaire submitted by Robin Gopaul, he states: "The water come from a tank and is often brownish in colour. The officer who work in the division don't ever drink this water." Similarly, Russell Sankeralli states in his questionnaire: "I am allowed to fill my two-litre mug twice a day, but the water is either dirty and/or tasting of rust and mud. The prison officers bost (sic) of their not having to drink of that water, they get special water from outside the division."
In response to these detailed allegations the State party merely states that the water is clean.

2. It has always been te jurisprudence of the Committee that when the author of a communication makes specific allegations that would point to a violation of a Covenant right, the State party cannot refute those allegations by a simple blanket denial. It must relate to the specifics of the case and do everything reasonably in its power to show that the allegations are unfounded. In the present case the State party could have given details of the water source from which water is supplied to inmates in the division in which the authors are being held, and the quality of that water. It could also have provided evidence that the prison officers drink from the same water source as the prisoners. It failed to do so. Due credence must therefore be given to the author's allegations regarding the water. These unrefuted allegations establish that the State party has violated the authors' right under article 10, paragraph 1, of the Covenant.

(*Signed*) Eckart KLEIN

(*Signed*) David KRETZMER

(Original: English)

Individual opinion by Mr. Scheinin (dissenting)

1. To my great regret it was impossible to find a consensus within the Committee on the merits of this communication, submitted by nine authors awaiting execution. My dissent relates to two separate issues, (a) prison conditions and (b) the fairness of the trial.

(a) Conditions on Death Row: Violation of article 10, paragraph 1

2. In my opinion, paragraph 5.4 and the beginning of para. 6.4 of the Views should have read as follows:

> 5.4 Counsel presents a second additional claim and argues that there has been a violation of article 7 of the Covenant in respect of all nine authors, because of the inhuman conditions of detention to which the authors have been subjected since their arrest. He refers to questionnaires completed by Dole Chadee, Joey Ramiah, Joel Ramsingh, Bhagwandeen Singh, Russell Sankeralli and Robin Gopaul which contain partly individualized details as to the treatment of the authors, partly information that relates to the conditions on Death Row that affect all the authors. The complaints relate to, *inter alia*, unsatisfactory medical treatment and specific instances of requested medical attention being denied, to water given to the detainees from a tank being contaminated and brownish, to the cells being without natural lighting, insufficiently ventilated and infested with insects, to frequent intimidating searches, to inadequate sanitary and sewage facilities, to the food being bad or even rotten. It is further claimed that the authors have not been allowed to go out for weeks or even months and that at best they can do so once a week.
>
> 6.4. With regard to the claim that there has been a violation of article 7 of the Covenant because of the conditions of detention, the State party denies that such a violation has taken place. This part of the State party submission consists of a general denial of the allegation presented on behalf of all nine authors plus a rather detailed description of the prison conditions in the Royal Gaol. In relation to the information presented on the questionnaires, the State party replies by stating that it is largely incorrect and that in so far it is accurate does not constitute a breach of article 7. [...]

3. As a consequence, a violation of article 10, para. 1, (but not of article 7) should have been established by adopting para. 10.3 of the Views as follows:

> 10.3. The authors have provided detailed information with regard to their conditions of detention. The concrete allegations relate both to conditions that affect all nine authors and to the individual treatment of those six of the authors who provided such details by filling a questionnaire. The State party has addressed the claims made by the authors,

> **and has submitted that the authors' conditions of detention do not violate the standards set out in the Covenant. The Committee notes, however, that the State party has failed to address the authors' claims in detail, in particular in respect to the lack of medical treatment and the contamination of the water. In the circumstances, the Committee finds that the information before it discloses a violation of article 10, paragraph 1, of the Covenant in relation to all nine authors.**

4. The consequence of my findings is that the authors are entitled to an effective remedy, including commutation of the death penalty.

5. Although the State party's reply, extensively paraphrased in paras. 6.4 to 6.8, represents a rather detailed account of prison conditions, it does not actually reply to the concrete allegations on inhuman treatment. For instance, both in relation to the quality of drinking water and access to medical service the authors have provided detailed and individualized information that could have easily been contested, if untrue, by the State party through providing a chemist's report on a water analysis and a doctor's report on some of the visiting rounds in Death Row. No information whatsoever from independent sources has been provided, and the State party reply on the allegations related to the drinking water consists basically of one word: "clean".

6. By making detailed and individualized allegations on their conditions of detention the authors have substantiated, taking into account the possibilities that they, on the one hand, and the State party, on the other, have for providing independent expert information, their claims to the effect that the State party would have had to submit objective evidence to refute the claims. Furthermore, the authors' description of the prison conditions is supported by the fact that the Committee has, in the cases of Harold Elahie v. Trinidad and Tobago (Communication No. 533/1993) and Clyde Neptune v. Trinidad and Tobago (Communication No. 523/1992), found a violation of article 10, para. 1, based on partly similar allegations by prisoners detained in the same prison (though not on Death Row). A violation of article 10, para. 1, in the case of a Death Row inmate in the same prison was established in Balkissoon Soogrim v. Trinidad and Tobago (Communication No. 362/1989) in relation to ill-treatment by warders but not in relation to the actual prison conditions. A distinctive element of the latter conclusion compared to the present case was the fact that the State party had produced individualized information on medical treatment, based on the medical record of the detainee.

(b) Fair trial: Violation of article 14, paragraphs 1 and 2

7. According to the authors the extensive pre-trial publicity of their case made a fair trial impossible. As is explained in para. 2.1 of the Views their constitutional motion based on this point was dismissed. In doing so, the Court of Appeal in January 1995, in my opinion rightly, stated that the securing of a fair trial was in the hands of the trial judge "who had at his disposal several options" to that end.

8. The problem as to the fairness of the trial arises, however, from the fact that this outcome of the constitutional motion was not respected. The State party resorted, in 1996, to legislative measures that affected the trial in two important respects, namely by providing for an unlimited

number of potential jurors (amendment to the Jury Act) and by allowing the use of the deposition of a deceased witness as evidence (amendment to the Evidence Act). Both amendments were passed while the case of the authors was awaiting trial, both had been designed for this particular case and both changed the list of "several options" that had been referred to in the Court of Appeal decision referred to above.

9. The Committee has, in Byron Young v. Jamaica (Communication No. 615/1995) dealt with the relevance of a verdict by jury for the Committee's own work. The Committee took the position that very limited possibilities to contest a verdict by jury in domestic appeal proceedings does not constitute a violation of article 14 provided, *inter alia* , that the trial itself was not unfair. In the present case the legislative amendments referred to in the preceding paragraph, enacted to secure the commencement of the trial, had the effect that a trial by jury could not be, and was not, fair. After the extensive media coverage, the constitutional motion process, the legislative amendments and the jury selection, subjecting the authors to a trial by jury constituted a violation of both the general principle of a right to a fair trial (article 14, para. 1) and the presumption of innocence (article 14, para. 2). Although the absolute prohibition against retroactive criminal legislation (article 15), does not as such apply to criminal procedure, article 14, paras. 1 and 2, must be understood to limit the enactment of retroactive legislation even in the procedural field when such legislation is designed for a concrete case.

10. I wish to emphasize that the finding in the preceding paragraph does not question, as such or in general, the jury institution as a constituent element of certain legal systems of the world. The consequence is a more limited one: if a State party to the Covenant opts for trial by jury and for limited possibilities to question the verdict on appeal, it must, in order to comply with article 14, also accept that there will be exceptional cases in which a trial will become impossible. If the laws of a State party do not provide for a fair trial, the only available remedy is release.

(*Signed*) Martin SCHEININ

(Original: English)

ANNEX XII

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 640/1995, McIntosh v. Jamaica* (adopted on 7 November 1997, sixty-first session)

Submitted by:	Michael McIntosh [represented by the London law firm of Denton Hall]
Victim:	The author
State party:	Jamaica
Date of communication:	9 January 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 November 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Michael MacIntosh, a Jamaican citizen who at the time of the submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6; 7; 10 paragraph 1; and 14, of the International Covenant on Civil and Political Rights. His death sentence was commuted in 1995. He is represented by Cathy Wilcox, of the London law firm Denton Hall.

The facts as submitted by the author

2.1 The author was convicted together with a co-defendant, Anthony Brown[1], on 23 November 1988 of the murder of one Marianne Brown and was sentenced to death on 29 November 1988 in the Home Circuit Court of Kingston. He appealed to the Court of Appeal in Jamaica, which, on 22 October 1991, dismissed his appeal. On 1 March 1993, his petition for Special Leave to Appeal to the Judicial Committee of the Privy Council was dismissed.

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*The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin and Mr. Danilo Türk.

2.2 Counsel contends that constitutional remedies are not available to her client in practice, due to his impecunious situation and the unavailability of legal aid. Reference is made to the Human Rights Committee's jurisprudence[2], in this respect.

2.3 At the time of submission of the case, an application for review of the capital classification of the author's offence was pending. Counsel argues that this does not constitute an available and effective domestic remedy for the violations claimed in the present communication because even if successful, it will likely only result in the sentence being commuted to life imprisonment. Following a classification hearing in early 1995, the author's death sentence was commuted to life imprisonment. The panel determined that he should serve a period of 18 years before becoming eligible for parole.

2.4 At the trial, the case for the prosecution was that, on 29 January 1987, Michael MacIntosh and Anthony Brown caused the death of Marianne Brown in the course of a robbery of a home, where they allegedly tied and locked Juliette Fields in a closet, tied and gagged Edna Copeland, and gagged the deceased. The prosecution's case was based on the testimony of Juliette Fields and on circumstantial evidence.

2.5 The sole eyewitness called at the trial testified that at the time of the robbery, the three women had been in different parts of the house, the witness staying on the top floor. She stated that she saw two men whom she had never seen before, climbing the stairs. The first man, whom she later identified as Anthony Brown, threatened her, tied her up, locked her in a closet, and took some personal effects from her. She also claimed to have briefly seen the second man, armed with a knife, at the beginning of the robbery, from a distance of 3 yards. After 5-10 minutes, she was able to look out of the closet and saw her aunt-in-law, Edna Copeland, lying on the ground, gagged and tied up. After she managed to obtain help from a neighbour, she saw the same two men enter the yard from a distance of 5-6 yards. A. Brown allegedly made further threats. The two men then took bicycles from the building and left. The witness further testified that after summoning police from a neighbour's house, she returned to her house to discover that others had found her 83-year old aunt, Marianne Brown, dead.

2.6 The witness asserted that the incident on the third floor lasted about 20 minutes, although she apparently told the Examining Magistrate during the preliminary enquiry that it lasted 3 minutes. She also stated that she had seen the face of the second man twice, at the beginning to the robbery and when they returned to the yard, for about 5-10 minutes, although she admitted she had not watched the time.

2.7 The only evidence of the cause of death of the deceased came from Detective Sergeant Cassells, who found the deceased lying on her back with a cloth tied around her neck and a cloth stuffed in her mouth; there were scratches on her neck. He attended an autopsy performed by Dr. Clifford, but no evidence from this examination was presented in court.

identified the author as the second man. She identified Anthony Brown as the first man at the third parade, which took place on 23 March 1987.

2.9 Counsel for the accused claims that the witness only had a limited recollection of the perpetrators' physical appearance, and did not give any details. Counsel further notes that the investigating officer spoke with the witness before the identification parades were held.

2.10 At the identification parade, the author was not represented by an attorney. The officer who conducted the identification parade testified at trial that the author told him that he did not want an attorney to be present, nor did he want anyone else representing him. A Justice of the Peace was present during the parade.

2.11 In an unsworn statement from the dock, the author asserted that he had asked the police officer to obtain a lawyer for him and that he had inquired about the "Legal Aid Clinic". He was told that there was no lawyer to represent him because the telephone was not working. He also claimed that he was physically abused by the police when he complained about the differences in the physical appearance of the men in the parade.

2.12 The author denied any knowledge of the incident and of his co-defendant throughout the trial. A. Brown allegedly made a statement implicating a certain "Mickey" in the robbery.

The complaint

3.1 Counsel alleges a violation of article 14 of the Covenant, because the trial judge failed to deal properly with the issue of identification in the author's case. It is further asserted that the judge failed to conduct his summing-up in an impartial manner. Counsel argues that the judge did not give sufficient attention to the issue of identification because he gave direction on identification only when reminded by counsel to do so. In addition, he may not have had in mind the different considerations that may have applied in the case of the author and in that of his co-defendant such as the difference in the length of time during which the prosecution witness was able to observe the two men. It is further submitted that the judge failed to warn the jury adequately of the danger of relying on the uncorroborated testimony of only one witness.

3.2 In addition, it is argued that the identification parade itself was conducted without adherence to the statutory rules then in force, requiring the presence of an attorney. Although the judge told the jury to disregard the parade if they thought that it was unfair, he failed to explain the importance of the procedural safeguard of having independent representatives present during the parade. He also did not remind the jury of the potential significance of the failure to identify either defendant by the other intended witnesses.

3.3 Counsel argues that, although the judge left the option of manslaughter open to the jury, he misdirected the jury on the have been other than to cause grievous bodily harm such as to keep the deceased quiet. In this connection, counsel notes that the judge drew no attention to the prosecution's unexplained failure to adduce evidence from the post-mortem examination.

3.4 It is claimed that the judge wrongly invited the jury to speculate about the two defendants' choice not to subject themselves to cross-examination, in a way favourable to the prosecution, and to speculate about the absence of fingerprinting evidence.

3.5 A no-case submission by counsel was rejected by the judge in the presence of the jury. It is contended that, in light of the irregularities and shortcomings of the evidence, the trial judge should have allowed the submission and withdrawn the author's case from the jury (sic).

3.6 In addition, counsel submits that the Court of Appeal of Jamaica erred in holding that the judge correctly directed the jury with regard to the issues of identification and the identification parades, further violating article 14.

3.7 Counsel further argues that the "agony of suspense" resulting from having been on death row for over six years amounts to cruel, inhuman and degrading treatment, in violation of articles 7 and 10, paragraph 1. Reference is made to the Pratt and Morgan[3] judgment of the Judicial Committee of the Privy Council. In addition, it is submitted that the overcrowded and unhealthy conditions at St. Catherine's District Prison amount to a breach of articles 7 and 10 paragraph 1. Reference is made to reports by America Watch and Amnesty International documenting, among other things the lack of mattresses, sanitation and medical care.

State party's observations and counsel's comments thereon

4.1 By submission of 17 October 1995, the State party submits comments on the admissibility of the communication and argues that the author has failed to substantiate his claims, since there has been no violation of any of the author's rights under the Covenant.

4.2 The State party refers to the Committee own jurisprudence in respect of the evaluation of facts and evidence, in so far as claims under article 14 are concerned. In respect of the allegations under article 7 and 10, paragraph 1, the State party submits that the fact that the author has spent six years on death row does not constitute a violation of the Covenant.

5.1 By submission of 22 December 1995, counsel reiterates her claims, and states that the commutation of the author's death sentence in no way alters the fact that a death penalty was imposed after a trial which was flawed, in breach of article 6, paragraph 2, of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its procedure, decide whether or not it is admissible under the Optional

6.2 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee refers to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 the Covenant, in the absence of some further compelling circumstances.[4] The Committee observes that neither the author nor his counsel have shown in what particular ways he was treated in ways that constitute "further compelling circumstances" that would be contrary to articles 7 and 10 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol, on the basis of the lack of substantiation.

6.3 The Committee notes that the author's claims under article 14 relate primarily to the conduct of the trial by the judge and his summing-up to the jury. It recalls that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. MacIntosh's trial suffered from such defects. In particular, it is not apparent that the judge should have asked the jury to retire while the author's counsel made a no case submission, nor that his instructions on the conduct of the identification parade were incorrect or in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the State party, to the author of the communication and his counsel.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] Anthony Brown, because he was under 18 at the time of the crime, was not sentenced to death.

[2] Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

[3] Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica; PC Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

[4] See Committee's Views on communication Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992; Communication No. 541/1993 (Errol Simms v. Jamaica), declared inadmissible on 3 April 1995; Communication No. 588/1994 (Errol Johnson v. Jamaica), Views adopted 22 March 1996, paras. 8.1 to 8.6.

B. Communication No. 735/1997, Kalaba v. Hungary* (adopted on 6 November 1996, sixty-first session)

Submitted by:	Lazar Kalaba
Victim:	The author
State party:	Hungary
Date of communication:	6 November 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 November 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Lazar Kalaba, an Australian citizen who claims to be a victim of a violation of his human rights by Hungary. He does not invoke any specific right contained in the Covenant, but the facts of the case may raise issues under article 26 (and article 14, paragraph 1) of the Covenant.

The facts as presented by the author

2.1 On 1 May 1941, the author was interned in Sárvár Concentration Camp by the Hungarian authorities, together with his mother and sisters. His two sisters died in the camp. The family's home and farm was totally destroyed. The author was released from the camp on 1 October 1942, undernourished and suffering with pneumonia.

2.2 At the time of his internment, the author was a Yugoslav citizen. On 18 February 1984, the author became an Australian citizen.

2.3 In 1993, the author applied for compensation from Hungary under Act XXXII of 1992. On 21 January 1994, the Compensation Department Budapest V rejected his claim, on the basis that he was not a Hungarian citizen either at the time of his internment, or at the time of his application.

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*The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Mrs. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr.

2.4 On 21 August 1995, the author appealed the decision to the Supreme Court of the Metropole in Budapest. He states that, despite three reminders, he still has not received a reply from the Supreme Court. He concludes that the Court does not wish to rule on his appeal, and requests the Human Rights Committee to examine his case.

The complaint

3.1 The author complains that the failure of the Hungarian Government to compensate him is a violation of his human rights and constitutes discrimination.

3.2 The facts of the case may seem to raise issues under article 26 of the Covenant, since the author appears to have been discriminated against on the basis of his nationality. The failure of the Supreme Court to reply to the author's appeal, may also raise issues under article 14, paragraph 1.

The State party's observations and the author's comments

4.1 By submission of 5 May 1997, the State party limits its observations with regard to the author's claims in so far as they may appear to raise issues under articles 14 and 26.

4.2 The State party recalls that the author's claim for compensation because of his internment at the Sárvár camp, which he submitted on 9 July 1993 under Act XXXII of 1992, was dismissed by the National Office for Compensation on 21 January 1994. The author's appeal was submitted on 11 July 1996[1] to the Budapest Municipal Court (Fõvárosi Bíróság) (not to the Supreme Court, as stated by the author). The author's statement of claim was forwarded to the National Office for Compensation for comments. The Office submitted its comments on 11 July 1996[2]. According to the State party, the Court has since tried in vain to provide the author with a copy of the Office's reply. Further, the Court, following the applicable rules in case of overseas claimants that there should be a delay of at least six months between the summons and the date of the hearing, set the hearing for 19 September 1997.

4.3 The State party submits that the procedure is still pending before the Court, and that the author's complaint should thus be declared inadmissible under article 5, paragraph 2(b), of the Optional Protocol. In this context, the State party explains that section 14 of Act XXXII of 1992 enables applicants to seek review of the decision of the National Office for Compensation before the Courts. The Courts can take procedural aspects as well as merits of the decision into account. Furthermore, articles 44 to 47 of Act XXX of 1989 empower the Constitutional Court to repeal any provision of domestic law which it finds contrary to an international treaty in force with regard to Hungary. It is thus open to the author to raise the alleged violation of article 26 of the Covenant, first, before the Budapest Municipal Court where his case is pending. Second, he could request the Court to send the case to the Constitutional Court to consider the validity of the challenged provision of the compensation legislation. The State party thus argues that the remedy which the author has already initiated is an effective one and should be exhausted before the Committee is to consider the communication.

4.4 The State party explains that Act XXXII of 1992 provides for compensation to persons (or their relatives) who were unlawfully deprived of their life or liberty for political reasons.[3] The State party points out that the author, in the application form, only requested compensation for his internment between May 1941 and October 1942. He has never claimed compensation for unlawful confiscation of property, and in this respect the State party argues that his claim is inadmissible for non-exhaustion of domestic remedies.

5.1 In his comments on the State party's submission, the author recalls the horrors of the Sárvár concentration camp in which he and his family were interned. He adds that his family's house was confiscated together with its furniture and farm equipment.

5.2 The author submits that he completed his application for compensation in July 1993, and mailed it to the National Office for Compensation with an explanatory letter. He received a negative reply, based on his nationality. He then, on 21 August 1995, appealed this decision to the Supreme Court of the Metropole indicated on the decision[4], with three copies to the National Office for Compensation, as required. He indicated his Australian address and has not changed addresses since.

5.3 He contests the State party's statement that he submitted a claim on 11 July 1996 to the Budapest Municipal Court and reiterates that it seems that the Supreme Court has not wished to reply to his appeal of 21 August 1995, in violation of article 14, paragraph 1, of the Covenant. He adds copies of records held at the Wagga Wagga Post Office in Australia, showing that he addressed registered letters to the National Office for Compensation on 28 August 1995, 23 October 1995, 13 November 1995 and 15 December 1995.

Committee's further rule 91 request

6. During its 60th session, in July 1997, the Committee, acting through its Working Group, decided that more information was required before the Committee could take a decision concerning the admissibility of the communication. It requested the State party to explain what actual steps the Budapest Municipal Court took to provide the author with the comments of the National Office for Compensation, the notification of the appeal hearing on 19 September 1997 or any other necessary documents.

Further State party's submission and the author's comments

7.1 By submission of 15 October 1997, the State party explains that the Budapest Municipal Court transmitted the comments of the National Office for Compensation to the author by registered mail, on 21 August and again on 6 December 1996, inviting him to make observations. No reaction arrived, upon which the Court, in order to avoid further delay, set a hearing for 19 September 1997, informing the author by letter of 22 April 1997. The author was advised that he could answer in writing to the questions posed by the Court, if he preferred.

7.2 On 19 August 1997, the author replied to this last letter from the Court. In his letter, the author observed that the appropriate court was the Supreme Court of the Metropole of Budapest and not the

Budapest Municipal Court. He stated that he had never received any correspondence before and told the court that he did not want it to do anything with his claim. He did not reply to the questions put to him by the court.

7.3 The State party explains that normally such lack of cooperation would have led to the dismissal of the appeal. In the instant case however, the Court was considering sending the files to the Constitutional Court in the light of the author's claim that the compensation legislation is discriminatory, and would thus have welcomed the author's observations.

7.4 The State party maintains that the Budapest Municipal Court is the competent court to hear appeals against the decision of the National Office for Compensation. The State party submits that the appeal is still pending and that the communication should thus be declared inadmissible for failure to exhaust domestic remedies.

8.1 In several letters, the author maintains that the Supreme Court of the Metropole is the only competent court to deal with his case. He states that he has not received any letters from the Hungarian courts until the letter of 22 April 1997 (which he only received on 7 August 1997), although his address was known throughout. He expresses his doubts about the good faith of the Hungarian authorities in dealing with his case, and requests the Committee to finalise his claim at its 61st session in October/November 1997.

8.2 The author explains that the Australian authorities translated his letters from English into Hungarian, and states that he has followed the instructions issued by Hungary regarding the claim, and that he is not responsible for any mistakes in the translation.

Issues and proceedings before the Committee

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The information before the Committee shows that the author was informed that a hearing in his appeal would take place on 19 September 1997, and that he was requested to submit observations in respect to his claim. The Committee notes that the author has challenged the competence of the Budapest Municipal Court to hear his case. However, nothing in the information before the Committee suggests that this court is not competent to deal with appeals against decisions of the National Office of Compensation, or that it would not be able to provide the author with an effective remedy. In the circumstances, the Committee considers that the communication does not fulfill the requirement of article 5, paragraph 2(b), of the Optional Protocol, that all domestic remedies must have been exhausted before the Committee can examine a case.

10. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol;

(b) that this decision may be reviewed under rule 92, paragraph

2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;

(c) that this decision shall be communicated to the State party and to the author.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] There seems to be a confusion of dates. The author states that he appealed on 21 August 1995.

[2] See note 1.

[3] Acts XXV of 1991 and XXIV of 1992 provide for compensation for the loss of property caused by the State.

[4] The decision by the National Office for Compensation of 21 January 1994, states (in certified translation): "Appeal against this decision may be lodged within 30 days of receipt of this notification addressed to the Supreme Court of the Metropole, appeal to be lodged in three copies either at the National Compensation and Retribution Department or the Supreme Court of the capital city".

C. Communication No. 611/1995, H. Morrison v. Jamaica*
(adopted on 31 July 1998, sixty-third session)

Submitted by:	Hixford Morrisson
Victim:	The author
State party:	Jamaica
Date of communication:	1 December 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 1998

Adopts the following:

Decision on admissibility

1. The author of the communication is Hixford Morrison, a Jamaican citizen, who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of a violation by Jamaica of articles 7, 10 and 14 of the Covenant. He is represented by Mr. George Brown of the London law firm of Nabarro Nathanson. On 15 June 1998, counsel confirmed that the author's death sentence had been commuted.

The facts as submitted by the author

2.1 On 25 April 1990, the author and three co-defendants[1] were convicted for the murder of one Elijah McLean, on 24 January 1989, and sentenced to death. On 12 May 1990, the author gave notice of application for leave to appeal. On 16 March 1992, the Court of Appeal dismissed the appeals of all four defendants, which had been based on discrepancies in the evidence and improper instructions by the judge to the jury. Following the enactment of the Offences Against the Persons (Amendment) Act 1992, the offence for which the author was convicted was classified as a capital offence.

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*The following members of the Committee participated in the examination of the communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Mrs. C. Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. J. Prado Vallejo, Mr. Martin Scheinin, and Mr. Maxwell Yalden.

2.2 The author has not petitioned the Judicial Committee of the Privy Council for special leave to appeal; counsel states that he has been advised that there is no likelihood of an appeal being successful[2], he refers to the dismissal of such a petition in co-defendant Byron Young's case. He states that Leading Counsel's advice in Mr. Morrison's case was not put in writing, but that he advised in conference that on the information available there were no grounds upon which to base an appeal to the Privy Council which would be successful.

2.3 The case for the prosecution was that the four accused were among seven men who entered the house of the deceased in the early morning of 24 January 1989, dragged him out of his bed, took him outside into the yard, and chopped him several times with their machetes, thereby killing him.

2.4 The prosecution mainly relied upon the evidence of three relatives of the deceased, aged eleven, fourteen and seventeen, who lived at the deceased's house. They testified that they were awakened by sound emanating from the room where the deceased and his common law wife were sleeping. They went to the doorway and saw one of the author's co-accused (Byron Young, whom they knew) with a flashlight in one hand and a gun in the other, pointed at the deceased. Six other men (including the author whom they also knew), all carrying machetes, were standing by the bed of the deceased, and one of the men chopped him on his forehead. All seven men then pulled the deceased off the bed and carried him outside. The deceased held onto the door and was chopped on his hand by one of the men. The witnesses further testified that, in the yard, he was chopped several times by six of the men, including the author, while the seventh man (i.e. Byron Young) stood in their midst with his gun still in his hand. All seven men then left.

2.5 The author made an unsworn statement from the dock, simply relating the circumstances of his arrest. The issue for the defence was one of identification and the "no case to answer" submissions made by the defence in all four cases were solely directed at the witnesses' credibility and their ability, given the lighting in the room and yard at the time of the incident, to correctly identify the accused. The author was represented by a legal aid attorney, who also represented co-defendant Samuel Thomas. No witnesses were called to testify on the author's behalf. Furthermore, no prior identification parade had been held and in the author's case also no preliminary hearing had been held prior to the trial.

2.6 Counsel contends that, while in theory it can be argued that Mr. Morrison has a constitutional remedy, it is clear that in practice such a remedy is not available to him because of his lack of funds and because legal aid is not made available for the purpose of a constitutional motion. With reference to the Committee's jurisprudence[3], it is submitted that it is the State party's inability or unwillingness to provide legal aid for such motions which absolves the author from pursuing constitutional remedies.

The complaint

3.1 The author claims that his detention on death row for over six years amounts to cruel, inhuman and degrading treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant. In this context, he refers to the decision taken by the Privy Council in the case of Earl Pratt and Ivan Morgan v. the Attorney-General of Jamaica[a]. The author recalls that it took the Court of Appeal 22 months to decide on his appeal, and that his prolonged detention on death row is therefore attributable to the State party. Reference is made to the report by Amnesty International of November 1993, which shows that the prison conditions in St. Catherine District Prison are appalling.

3.2 The author further claims that he has not received a fair trial. He states that no preliminary hearing was held in his case, since he was indicted on a Voluntary Bill of Indictment. At the beginning of the trial, the author's counsel requested copies of the police statements in order to prepare the defence. Copies, however, were not made available which is said to have seriously hindered the author's defence. It is argued that this amounts to a violation of article 14, paragraphs 1, 3(b) and (e), of the Covenant.

3.3 In respect of the author's claims under article 14, counsel points out that it is an overriding concept of criminal law that any accused person should know the case that he or she will have to meet at trial. The normal procedure prior to a criminal trial is that there is a preliminary hearing or committal hearing, at which witnesses for the prosecution are called to give evidence on oath, so enabling the accused to know the case he or she has to answer to. Counsel explains that there exists a procedure which allows for a trial to be held without a prior committal or preliminary hearing, which is known as a "Voluntary Bill of Indictment". In such a case, the indictment or charge plus supporting documentation is placed before a judge who, once he has ensured that there is sufficient evidence to support the issuing of the indictment, signs the Bill of Indictment. Counsel further points out that the Voluntary Bill of Indictment should only be used in exceptional circumstances which should be explained to the judge who is requested to sign the indictment.

3.4 It is submitted that for the procedure of indictment by voluntary bill to work in a just and fair manner, the supporting statements which have been shown to the judge must be made available to the accused's legal representative. Counsel refers to the trial transcript from which it appears that this did not happen in Mr. Morrison's case. At the beginning of the trial, the author's attorney indicated to the trial judge that he had asked counsel for the prosecution to make the police statements available to him. The judge replied that: "[...] I don't know of any powers that I have to order the learned Director of Public Prosecution to give you any statement [...] I think [you] are entitled to a copy of the depositions, and if you have not gotten one, then I will ask the Registrar to give you one". The attorney then again explained to the judge that his client was indicted on voluntary bill, that there were therefore no depositions of the prosecution witnesses, and that the only statements in the case relating to his client were the police statements. The judge then told the attorney that: "I am not aware of any authority which says I must order that you be given the statements; if you can cite the authority, I will take a look and give a ruling". The attorney then said that he would make further researches into the matter.

3.5 Counsel points out that, although the attorney stated that he would make further inquiries in relation to his application, these, if they were done, were not transmitted to the judge. It is submitted that, in any event, since the judge allowed the trial to continue without the statements being made available, the author suffered prejudice because a trial cannot be fair if a defendant in a criminal case is not provided with sufficient information to allow him to establish the case that he has to answer to. In this context, counsel adds that the law in England, upon which the Jamaican common law is based, requires that any document or other matter "that has, or might have, some bearing on the offences charged" should be made available to the defence (R. v. Saunders & Ors (unreported) 29 September 1990 CCC Transcript no. T881620). Reference is made to another judgment, in which it was ruled that "the duty of disclosure rests upon prosecuting counsel [...], the police [...] and other professionals (such as scientific and forensic experts), who are involved in the particular case".

3.6 As to the issue of domestic remedies in respect of the above, counsel concedes that the failure of the prosecuting authority to provide the police statement should have been pursued at the trial and should have been a ground of appeal before the Court of Appeal. He points out that the attorney who represented both Mr. Morrison and Mr. Thomas at the trial, also represented the latter on appeal, but that Mr. Morrison was represented by another legal aid lawyer; this lawyer did not raise the issue of the non-disclosure of the statements before the Court of Appeal. According to counsel, the low legal aid rates paid to lawyers who represent poor persons in Jamaica are the cause of the limited preparation of the defence at trial and on appeal.

State party's comments and counsel's observations thereon:

4.1 In a submission of 29 April 1996, the State party contends that the communication should be declared inadmissible for non exhaustion of domestic remedies, nevertheless and in order to expedite the consideration of the case it addresses the author's claims.

4.2 With respect to the allegation of violation of articles 7 and 10, paragraph 1, of the Covenant and the "death row phenomenon" claim, the State party rejects that prolonged detention per se constitutes a violation and refers to the Committee's own Views in Pratt and Morgan. However, it informs that in the light of the Privy Council's judgment in Pratt and Morgan v. the Attorney General of Jamaica, the author's death sentence will be commuted.

4.3 With respect to the allegation that the author was denied a fair trial, in violation of article 14, paragraph 1, of the Covenant, due the fact that the police statements were not made available to the author's attorney at the beginning of the trial in which the author had been indicted on a voluntary bill of indictment, the State party notes that "the failure to provide defence counsel with police statements when the accused has been indicted constitutes a serious breach of practice. The records of the trial indicate that the trial judge had some doubt about ordering the Crown to produce the statements and asked that defence counsel support his application by citing some authority. Defence counsel promised to do so, but apparently did not". The State party submits that it cannot be held accountable for failure of defence counsel to follow through on his application.

4.4 With respect to the alleged violation of article 14, paragraph 3 (e), based on the same set of facts as above, the State party relies on the same reasoning as above to reject any breach of the Covenant.

5. Counsel reiterates the claims submitted in the original communication regarding unfair trial since the State party has failed to provide counsel with the statements on which the voluntary bill of indictment was based at the beginning of the trial.

Issues and proceedings before the Committee:

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it its admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the author has not filed a petition for special leave to appeal to the Judicial Committee of the Privy Council since the case of his co-defendant was dismissed. The Committee considers that, in the instant case, as expressed by counsel, there would be no merit in the author doing so, and therefore considers that this is not a recourse he needs pursue. The Committee considers that the author has exhausted domestic remedies for purposes of the Optional Protocol.

6.3 With regard to the allegation that the author did not have a fair trial, in violation of article 14, paragraph 1, the Committee notes that the author was tried for murder by a judge and jury under regular procedures of the Jamaican legal system. He was found guilty by the jury who heard and assessed the evidence against him, and the case was reviewed by the Court of Appeal. The fact that he was joined by "a voluntary bill of indictment", after the preliminary enquiry had already taken place for the rest of the co-accused, following an established procedure, would not necessarily invalidate the fairness of the trial[5]. Furthermore, this matter was never raised before the Courts, either on trial or on appeal. The Committee finds that in this respect, the author has no claim under article 2 of the Optional Protocol.

6.4 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial, in violation of article 14, paragraph 3 (b) and (e), the Committee recalls its prior jurisprudence where it has held that it is not for the Committee to question counsel's professional judgment, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his best judgment. Furthermore, counsel at trial was also representing the author's co-accused Thomas, and had all the relevant documents, since the indictment was of murder by way of joint enterprise between the four co-accused. Consequently, the Committee finds that the author has no claim under article 2 of the Optional Protocol in this respect.

6.5 Concerning the author's claim that his prolonged detention on death row amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant, the Committee notes that although some national courts of last resort have held that detention on death row for a period of five years or more violates their constitutions or laws, the jurisprudence of the Committee remains that detention on death row for any specific period of time does not constitute a violation of articles 7 and 10, paragraph 1, of the Covenant in the absence of further compelling circumstances. Since the author has not adduced any specific circumstances, which would raise an issue under articles 7 and 10, paragraph 1, of the Covenant, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, to the author and his counsel.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.)

Notes

[1] Among the co-defendants were Samuel Thomas and Byron Young, whose cases have been submitted to the Human Rights Committee, and have been registered as communication No. 614/1995 and communication No. 615/1995, respectively. Views were adopted on 4 November 1997 in Byron Young's case.

[2] The Judicial Committee of the Privy Council dismissed Samuel Thomas' petition for special leave to appeal to on 6 July 1994, and that of Byron Young on 11 January 1995.

[3] Communication No. 445/1991 (Champagnie et al. v. Jamaica), decision on admissibility adopted on 18 March 1993; para. 5.4.

[4] Privy Council Appeal No. 10, judgment delivered on 2 November 1993.

[5] See Communication No 749/1997, McTaggart v. Jamaica, Views adopted on 31 March 1998.